

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

PAUL ROSA, INC.

Plaintiff

MEMORANDUM
DECISION

vs.

Index No. 5425/07

VALLEY FORGE INSURANCE COMPANY

Defendant

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **CULLEY, MARKS, TANENBAUM & PEZZULO**
Attorneys for Plaintiff
Gary J. Gianforti, Esq., of Counsel

HISCOCK BARCLAY, LLP
Attorneys for Defendant
Brian G. Manka, Esq., of Counsel

CURRAN, J.

Before the Court is plaintiff’s motion and defendant’s cross-motion for summary judgment.

On December 15, 2005, plaintiff purchased a “renewed business account package policy” (the “policy”) issued by defendant with the effective dates of December 15, 2005 to December 15, 2006. The premium cost for the policy was \$85,248.29. Among other locations, plaintiff has stores located on Sheridan Drive in Tonawanda, on Union Road in Cheektowaga, and on McKinley Road in Hamburg (the “subject stores”).

Section 5(h) of the policy, subtitled “Civil Authority,” states: “we will pay for the actual loss of business income you sustain and necessary extra expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property other than at the described premises, caused by or resulting from a covered cause of loss. This coverage will apply for a period of up to 30 consecutive days from the date of that action of civil authority.”

On or about October 12, 2006, a severe snow storm struck the Greater Buffalo area and a state of emergency was declared in Erie County inclusive of all cities and towns. Travel bans also were issued by some municipalities. As a result of the storm, the subject stores were closed on Friday, October 13, 2006, and both the Hamburg and Tonawanda stores remained closed on Saturday, October 14, 2006. In this action, plaintiff seeks to recover under its policy for loss of business income sustained by virtue of those store closures.

The parties agree that there are no material issues of fact and that the issue before the Court is whether the driving bans/travel advisories “prohibited access” to the stores thereby entitling plaintiff to coverage for loss of business income and extra expense.

In support of the motion, plaintiff submits the affidavit of Anthony Caruana, the Supervisor of the Town of Tonawanda, who states that the previous Town Supervisor Ronald Moline declared a state of emergency in Tonawanda beginning October 12, 2006 at 10:26 p.m. Concomitant with the declaration, the Town issued a press release describing the traffic and road hazards imperiling the safety of the citizens of the town caused by the storm. It also informed that public safety officials were urging all residents to stay indoors and that the police were urging all residents to curb driving due to dangerous road conditions. On October 17,

2006, Moline declared a five-day extension of the state of emergency and as part of the extension he requested residents to restrict any unnecessary travel. On October 21, 2006, Moline declared a further five-day extension to the initial state of emergency declaration. At that time, he advised motorists and pedestrians to use caution on all town streets and sidewalks.

Plaintiff also submits the affidavit of Steven J. Walters, the Supervisor of the Town of Hamburg, stating that on October 13, 2006 at 5:00 a.m. he issued a declaration of a state of emergency for the Town of Hamburg. As part of the declaration, he instituted a vehicular driving ban in the town until the state of emergency was lifted. On October 22, 2006 at 6:00 p.m. the state of emergency and driving ban was rescinded.

Also in support of plaintiff's motion is the Affidavit of Mary Holtz, the Supervisor of the Town of Cheektowaga, who states that on October 13, 2006 at 3:07 a.m., Dennis Gabryszak, the former Town Supervisor, issued a declaration of a state of emergency for the Town of Cheektowaga. He concurrently issued a vehicular driving ban in the town until the state of emergency was lifted. On October 14, 2006 at 7:00 a.m., the state of emergency and driving ban was rescinded by him.

In opposition to plaintiff's motion, and in support of its cross-motion for summary judgment, defendant submits the affidavit of Brian Manka, Esq. Defendant asserts that none of the three Supervisors ordered that access to any of plaintiff's stores or to any other businesses located in their towns be prohibited, nor did any of the three Supervisors order plaintiff to close its doors or order that any other businesses located within their towns be closed. Defendant notes that, on October 15, 2006, despite the fact that the state of emergency and driving ban had yet to be rescinded in the Town of Hamburg, plaintiff made \$15,853.00

worth of sales at its Hamburg store. The affidavit further details the sales totals at the Hamburg store through October 22, 2006, the date on which the state of emergency and driving ban was lifted, as well as sales made at the Tonawanda store during the alleged ban.

According to defendant, there is no proof before the Court that any action was taken by the subject towns, either direct or otherwise, to prohibit anyone from accessing plaintiff's stores or the locations of any other businesses, nor is there any evidence that the state of emergency declarations and driving bans/travel advisories actually prevented access to plaintiff's stores, even indirectly. Defendant maintains that the only action taken to prohibit access to plaintiff's stores was plaintiff's independent decision not to open them to the public on October 13 and 14, 2006.

On a motion for summary judgment, until the movant establishes its entitlement to judgment as a matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied (*Loveless v Am. Ref-Fuel Co. of Niagara, LP*, 299 AD2d 819, 820 [4th Dept 2002]). However, once the moving party establishes its entitlement to judgment through the tender of admissible evidence, the burden shifts to the non-moving party to raise a triable issue of fact (*Gern v Basta*, 26 AD3d 807, 808 [4th Dept 2006], *appeal denied* 6 NY3d 715 [2006]).

None of the cases cited by either party is directly on point. Although there are reported cases discussing similar policy provisions involving hurricanes (*Fountain Power Boat Indus., Inc. v Reliance Ins. Co.*, 119 F Supp 2d 552 [ED NC 2000]; *South Texas Med. Clinic PA v CNA Fin. Corp.*, 2008 US Dist LEXIS 11460 [SD Tex 2008]), floods (*Narricot Indus., Inc. v Fireman's Fund Ins. Co.*, 2002 US Dist LEXIS 19074 [ED Pa 2002]), the 9/11 attacks (*New*

York Career Inst. v Hanover Ins. Co., 6 Misc 3d 734 [Sup Ct, New York County 2005, Fried, J.]; *Broad St. LLC v Gulf Ins. Co.*, 37 AD3d 126 [1st Dept 2006]; *Abner, Herrmann & Brock, Inc. v Great Northern Ins. Co.*, 308 F Supp 2d 331 [SD NY 2004]; *Southern Hospitality, Inc. v Zurich Am. Ins. Co.*, 393 F3d 1137 [10th Cir 2004]), curfews (*Sloan v Phoenix of Hartford Ins. Co.*, 46 Mich App 46, 207 NW2d 434 [1973]; *Syufy Enters. v Home Ins. Co. of Indiana*, 1995 US Dist LEXIS 3771 [ND Ca 1995]) and the like, the Court could not locate any decisions addressing travel bans/advisories due to a snowstorm. Nevertheless, the plain language of the insurance contract and the Executive Law are sufficient.

Pursuant to Executive Law § 24 (1), in the event of a disaster or similar public emergency within the territorial limits of any county, city, town or village, and upon a finding by the chief executive thereof that the public safety is imperiled thereby, such chief executive may proclaim a local state of emergency within any part or all of the territorial limits of such local government. Following such proclamation and during the continuance of such local state of emergency, the chief executive may promulgate local emergency orders to protect life and property or to bring the emergency situation under control.

Pursuant to Executive Law § 24 (1) (a), such orders may provide for the prohibition and control of pedestrian and vehicular traffic, except essential emergency vehicles and personnel. Further, pursuant to Executive Law § 24 (1) (b), such orders may provide for the designation of specific zones within which the ingress and egress of vehicles and persons may be prohibited and regulated. Perhaps most significantly, Executive Law § 24 (5) provides that “any person who knowingly violates any local emergency order of a chief executive promulgated pursuant to this section is guilty of a class B misdemeanor.”

A review of the record on these motions reveals that the executives of all three towns clearly invoked this article of the Executive Law when issuing their state of emergency declarations and when issuing the concomitant travel bans in Hamburg and Cheektowaga.

According to Merriam-Webster's Dictionary, the word "ban" is defined as: "to prohibit especially by legal means; to prohibit the use, performance, or distribution of." Thus, under the plain language of the insurance contract and the Executive Law, a "travel ban" is an "action of civil authority that prohibits access." The fact that plaintiff's employees and customers subjected themselves to possible criminal prosecution in violating the bans does not render the bans to no longer be "actions of civil authorities that prohibit access." Rather, in doing so, plaintiff simply mitigated its damages.

Accordingly, plaintiff has met its burden of establishing its entitlement to judgment as a matter of law as to its claims for loss of business income sustained by virtue of the store closures in Cheektowaga and Hamburg. The unrefuted proof in this record establishes that, as a result of the travel bans in effect, both the Hamburg and Cheektowaga stores were closed on Friday, October 13, 2006, and the Hamburg store remained closed on Saturday, October 14, 2006. Defendant has failed to meet its burden on its cross-motion as to these two stores and has likewise failed to raise a triable issue of fact in opposition to plaintiff's motion. Therefore, plaintiff's motion for summary judgment is granted with respect to the stores located on Union Road in Cheektowaga and on McKinley Road in Hamburg.

With regard to the store located on Sheridan Drive in Tonawanda, plaintiff has failed to carry its burden on this motion. Although the affidavit of Anthony Caruana, the Supervisor of the Town of Tonawanda, establishes that a state of emergency had been declared

in Tonawanda for the time period relevant to this motion, there is no proof in the record of a travel ban being issued. Rather, the declaration contains at most a travel advisory which is insufficient to establish as a matter of law that access was prohibited by civil authority.

While the papers submitted in support of defendant's cross-motion for summary judgment contain a document which appears to be a State of Emergency and Travel Ban issued by the County Executive of the County of Erie, which clearly includes all three municipalities at issue on this motion, that document is unavailing (See Exhibit D to Defendant's Cross-Motion at bates no. 0139). First, plaintiff failed to include the County's State of Emergency and Travel Ban in its moving papers, thereby failing to carry its burden as to that declaration. Plaintiff elected instead to rest its motion solely on the declarations from the towns. Second, even if the Court were to search the record on plaintiff's motion, the County's declaration is undated and of no evidentiary value without information as to the date of issuance and the date of termination. Therefore, plaintiff's motion for summary judgment is denied with respect to the store located on Sheridan Drive in Tonawanda.

Likewise, defendant has failed to carry its burden of establishing its entitlement to judgment as a matter of law as to dismissal of plaintiff's claim for loss of business income sustained by virtue of the store closure in Tonawanda. The strongly-worded travel advisories issued by the Tonawanda Supervisor and the County's undated travel ban in defendant's own papers raise a triable question of fact concerning whether access to the Tonawanda store was in fact prohibited.

Based on the foregoing, plaintiff's motion for summary judgment is granted with respect to the stores located in Cheektowaga and Hamburg and denied with respect to the store located in Tonawanda. Defendant's cross-motion for summary judgment is denied in all respects. Plaintiff's counsel shall settle the Order with defense counsel and a pretrial conference shall take place on April 20, 2009 at 2:00 p.m.

DATED: January 26, 2009

HON. JOHN M. CURRAN, J.S.C.