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

PRESENT: EDWARD H. LEHNER Justice

PART 19

Wm. Mark Scored

-v-

U.S. Fidelity & Guaranty Co.

INDEX NO. 604417/02

MOTION DATE

MOTION SEQ. NO. 008

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

motion is decided in accordance with accompanying memorandum decision

FILED

OCT 27 2005

COUNTY CLERK'S OFFICE

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

Dated: OCT 27 2005

J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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WAL-MART STORES, INC.,

Plaintiff,

INDEX NO.
604417/02

- against -

UNITED STATES FIDELITY AND GUARANTY COMPANY and LEXINGTON INSURANCE COMPANY,

Defendants.

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EDWARD H. LEHNER, J.:

Before the court is a motion by United States Fidelity and Guaranty Company ("USF&G") and Lexington Insurance Company ("Lexington")(collectively the "defendants" or the "Insurers") for summary judgment dismissing plaintiff's complaint, and a cross-motion by plaintiff to dismiss the Insurers' defenses of lack of fortuity, known loss, loss in progress and late notice. USF&G's fourth affirmative defense is inevitable or non-fortuitous loss and its twentieth affirmative defense is late notice. Lexington's third affirmative defense is that the loss was not fortuitous and its sixth affirmative defense is late notice. Defendants withdrew their argument that the cross-motion was untimely (Tr. p. 56).

Plaintiff has alleged one cause of action for breach of contract for the failure to pay under the policies issued by the Insurers (the "Policies"), which are identical in all parts pertinent to this motion (defendants' Memorandum of Law dated June 30, 2005, page 4), and each of which contains a $250,000 deductible.

The Policies contain the following provisions:

"7. COVERAGE
Except as hereinafter excluded, this policy covers:

* * *

c. Business Income ...
(1) Actual loss of Business Income from necessary interruption of business conducted by the Insured. The interruption must be caused by direct physical loss or damage by an insured peril during the term of this policy to Real and Personal Property insured hereunder.

Business Income means:
(b) ... fifteen percent (15%) of the net sales which would have occurred had there been no loss.

(2) Resumption of Operations

If the Insured could reduce the Business Income loss by a complete or partial resumption of operations:

* * *

(c) by using substitute facilities,

the Company will deduct such reduction from the amount of Business Income loss.

* * *

26. NOTICE OF LOSS

As soon as practicable after any loss or damage occurring under this policy is known to the Insured's home office insurance department, the Insured shall report such loss or damage with full particulars to Johnson & Higgins for transmission to (defendants).

* * *

30. LOSS ADJUSTMENT EXPENSES

This policy is extended to include expenses incurred by the Insured, or by the Insured's representatives for preparing and certifying details of a claim resulting from a loss which would be payable under this policy ....

* * *

35. SUE AND LABOR

In case of actual or imminent loss or damage by a peril insured against, it shall, without prejudice to this insurance, be lawful and necessary for the Insured, their factors, servants, or assigns to sue, labor, and travel for, in, and about the defense, the safeguard, and the recovery of the property or any part of the property insured hereunder; nor, in the event of loss or damage, shall the acts of the Insured or of this Company in recovering, saving, and preserving the insured property be considered a waiver of an

> acceptance of abandonment. This Company shall contribute to the expenses so incurred according to the rate and quantity of the sum herein insured."

Plaintiff contends: that on December 6, 1996 a boulder weighing approximately 60 tons fell from the hillside above its Dickson City store ("the Store") and hit the Store (the "Accident"), buckling its back wall; that the storeroom of the Store which was used to house 80%-90% of its merchandise and the main corridor to the selling floor had to be closed off as a result of the damage caused by the boulder (Martin affidavit ¶¶ 3-8); that plaintiff attempted to remove the boulder and repair the structural damage but was unable to get workers to perform this work (Prociak affidavit ¶3); that "(w)ithout the ability to use the stockroom and main corridor, (the Store) could not operate as designed ... (since) merchandise could no longer be stored ... (nor could it be transported) from the stockroom onto the selling floor" (Martin affidavit ¶9); that the Store was shut down on December 17, 1996; that plaintiff temporarily relocated on January 11, 1997 to a store in Taylor, Pennsylvania (the " Taylor Store") which was ten miles from the Store; that the Taylor Store was 55,000 square feet in comparison to the Store's 114,000 square feet; that the Taylor Store remained open until February 28, 1998 when plaintiff completed a new store in Dickson City (the "New Store")(id, ¶¶ 13-19); that only with the New Store's opening did plaintiff's sales return to normal levels; that it provided

timely notice of the loss to the broker that advised the Insurers; and that it is entitled to recover at least $5,777,828 on its claim for lost income, at least $500,000 in expenses allegedly incurred for the purpose of reducing the loss, and at least $809,015 in expenses incurred in preparing and certifying the loss (Exhibit 88, Second Amended Response to Lexington's First Set of Interrogation, 8(b)).

Defendants assert that: after the Store opened in 1992, but before the inception of the Policies, there were numerous rock slides including a 60-ton boulder falling on the Store on April 3, 1996; that plaintiff was aware of the geological instability of the hillside that resulted in falling rocks; that plaintiff's decision to close the Store was a business decision rather than a result of the Accident; that since plaintiff knew of the risk of rock slides, the accident was not fortuitous and therefore not covered; that the rock slides constitute a known loss and a loss in progress and therefore not covered; that plaintiff's claimed expenses in opening the Taylor Store are not covered by the Sue and Labor clause; and that plaintiff's claimed expenses in certifying the loss include attorneys' fees not covered by the Policies.

Since defendants are seeking summary judgment they "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact .... Once this

showing has been made, however, the burden shifts to the party opposing summary judgment to produce evidentiary proof sufficient to establish the existence of material issues of fact requiring a trial" [Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986)]. However, "(i)n considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion" [Martin v. Briggs, 235 AD2d 192, 196 (1st Dept. 1997)]. "A plaintiff's evidence in opposition to a defendant's summary judgment motion need not conclusively prove her case (since)(t)he motion court's proper role is merely issue finding, not issue determination, ... and the court must draw all reasonable inferences in the opposing party's favor" [Rose v. DaEcib USA, 259 AD2d 258, 259 (1st Dept. 1999)].

Insurance Law §1101 (a)(2) states:

> "'Fortuitous event' means any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party."

"An 'all risk' policy covers 'all fortuitous losses not resulting from misconduct or fraud'"[A&B Enterprises, Inc. v. Hartford Insurance Company, 198 AD2d 389, 390 (2nd Dept. 1993)]. "(W)here plaintiff deliberately removed (a) component from its generating plant for diagnostic testing and preventive maintenance, the resulting downtime ... (was not) a fortuitous event ... (since it

was not an) event beyond plaintiff's control" [New York State Electric & Gas Corp. v. Lexington Insurance Company, 204 AD2d 226 (1st Dept. 1994)]. The December 6, 1996 fall of a 60-ton boulder into the Store cannot be said to have been within plaintiff's control to a substantial extent, but rather was "an event happening by chance or accident"[80 Broad Street Co. v. United States Fire Insurance Co., 88 Misc. 2d 706, 707 (Sup. Ct.. N.Y. Co.. 1975)], aff'd. on the op. below, 54 AD2d 888 (1st Dept. 1976), lv. denied 42 NY2d 801 (19 77). While, as in National Union Fire Insurance Company of Pittsburgh, Pa. v. The Stroh Companies, Inc., 265 F. 3d 97 (2nd Cir. 2001), the act involved (closing the Store) was intentional, the loss "resulted from an accidental or unintended event" (p. 111). Since the facts set forth in the papers demonstrate that the Accident cannot be said to have been "substantially certain to occur" (id p. 106), defendants' claim that the loss was not fortuitous lacks merit and plaintiff's cross-motion to dismiss the lack of fortuity defense is granted. See also, David Danzeisen Realty Corp. v. Continental Insurance Company, 170 AD2d 432 (2nd Dept. 1991).

"The 'known loss' defense is a variation on the fortuity theme. It holds that 'an insured may not obtain insurance to cover a loss that is known before the policy takes effect'"[National Union Fire Insurance Company of Pittsburgh, Pa. v. The Stroh Companies, Inc., supra at p. 106. "[T]he known loss doctrine

does not bar coverage ... [e]ven if the risk was known, and known to be high" (id. p. 108). Defendants claim that the risk of falling rocks from the hillside made the Accident a known loss. However, since while there was a risk of falling boulders, the Accident occurred after the Policies were in effect and the damages were not "fully known to the plaintiff ... before the commencement of coverage"[Henry Modell and Company, Inc. v. General Insurance Company of Trieste & Venice, 193 AD2d 412, 412-413 (1st Dept. 1993)]. Dismissal of plaintiff's complaint as being a known loss is denied and the Insurers' affirmative defense of known loss is stricken.

Plaintiff seeks recovery for lost profits for the period the Store was closed on December 17, 1996 until the New Store was opened on March 1, 1998, contending that since the Taylor Store was smaller and less conveniently located than the Store, it is entitled to the diminution in profits as well as the expenses it incurred to reduce the amount of the loss. "The purpose of business interruption insurance is to indemnify the insured against losses arising from inability to continue normal business operation and functions due to the damage sustained as a result of the hazard insured against .... In other words, the goal is to preserve the continuity of the insured's earnings" [Howard Stores Corp. v. Foremost Insurance Company, 82 AD2d 398, 400 (1st Dept. 1981), aff'd. for reasons stated, 56 NY2d 991 (1982). While defendants have alleged that in

shutting down the Store plaintiff made a business decision in an effort to allay the fears of employees and customers, plaintiff has raised material issues of fact on its claim that the Accident caused such damage to the stockroom and corridor that normal business operation in the 114,000 square feet Store, which sold a wide variety of items including fresh food, became impossible.

"Sue and labor clauses are intended to encourage an insured to take measures to preserve the subject matter of the insurance policy .... In exchange, the insurer must reimburse the insured for the expenses it incurs, since the insured has acted to benefit the insurer by averting or mitigating an otherwise recoverable loss .... When a policy contains a sue and labor clause, an insurer may be able to argue that the insured has forfeited its coverage if it does not sue and labor to minimize the covered loss" [International Commodities Export Corp. v. American Home Assurance Company, 701 F. Supp. 444, 452 (S.D.N.Y. 1988), aff'd. 896 F. 2d 543 (2nd Cir. 1990). See also ITT Industries, Inc. v. Factory Mutual Insurance Company, 303 AD2d 177 (1st Dept. 2003). Defendants have alleged that closing the Store was a business decision by plaintiff. However, plaintiff has presented evidence that the Taylor Store was a temporary substitute that was opened to mitigate the damage caused by the Accident. While defendants also maintain that such clause applies only to preservation and protection of physical property and thus not to lost business

income, that defense cannot be determined solely from a reading of the provisions of the Policies and extrinsic evidence would be admissible on that issue. Consequently, that issue, together with the disputed factual conflict, precludes dismissal of plaintiff's claim for sue and labor damages.

While in their memorandum of law dated June 30, 2005, defendants argue that they did not receive timely notice of the claim sued upon herein, at oral argument they acknowledged that the defense related to plaintiff's failure to provide defendants notice of the April 3, 1996 incident and other boulder damages to the Store (Tr. pp. 45, 56, 57, 71). Here, defendants have not contested that they were notified of the Accident by letter of Johnson & Higgins dated December 23, 1996 (Exhibit "M" to affirmation of Christopher Loeber dated August 2, 2005), nor have they shown that any of the prior incidents caused a loss in excess of the Policies' $250,000 deductible and were thus a covered loss under the Policies. The cases relied upon by defendants, Power Authority of the State of New York v. Westinghouse Electric Corp., 117 AD2d 336 (1st Dept. 1986) and Republic New York Corp. v. American Home Assurance Co., 125 AD2d 347 (1st Dept. 1986), both involved late notice of the particular property damaged and did not involve notice of prior accidents as is the issue here. Hence, defendants have not shown the viability of their defense that the failure to give notice of the prior damages violates the late notice

provision of the Policies, and thus the defense of late notice is stricken.

Plaintiff is seeking attorneys' fees for this litigation, contending that it "is effectively a claim certification process" (plaintiff's memorandum of law dated August 2, 2005, p. 22). However, "(i)t is well settled in New York that a prevailing party may not recover attorneys' fees except where authorized by statute, agreement or court rule (or when) ... an insured who is cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations ... prevails on the merits" [U.S. Underwriters Insurance Company v. City Club Hotel, LLC, 3 NY3d 592, 597 (2004)]. "(T)he fundamental principle (is) that 'the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser'" [Chapel v. Mitchell, 84 NY2d 345, 348 (1994)], quoting Alyeska Pipeline Co. v. Wilderness Society, 421 US 240, 247. The Policies cover "expenses ... for preparing and certifying details of a claim." In construing an insurance policy, "(w)here the provisions of the policy 'are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement ...'" [United States Fidelity & Guaranty Co. v. Annunziata, 67 NY2d 229, 232 (1986)]. The plain meaning of preparing and certifying a claim is not litigating a claim and plaintiff's claim for attorney's fees is dismissed.

In conclusion, defendants' motion for summary judgment dismissing the complaint is granted solely to the extent of dismissing plaintiff's claim for attorneys' fees and is otherwise denied, and plaintiff's cross-motion is granted to the extent set forth above.

This decision constitutes the order of this court.

Dated: October 27, 2005

J.S.C.