

**Royal Indemnity Company v Retail Brand Alliance,
Inc.**

2006 NY Slip Op 30514(U)

February 23, 2006

Supreme Court, New York County

Docket Number: 601164/04

Judge: Helen E. Freedman

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

PRESENT: FREEDMAN
Justice

PART 39

Royal Indemnity Co.

INDEX NO. 601164/04

MOTION DATE _____

- v -

Retail BRAND Alliance, et al

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

FEB 27 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2-23-06

HSJ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
Helen E. Freedman, J.S.C.

This is an 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 Retail Brand Alliance, Inc. ("RBA") and located at One Liberty Plaza, New York, New York. Royal Indemnity Company ("Royal Indemnity") brings this declaratory action against RBA, seeking a determination concerning the rights and liabilities of the parties under the insurance policy that it issued to Brooks Brothers' previous owner Marks & Spencer Finance, Inc. RBA counterclaims against Royal Indemnity, its United States insurer, and brings a third party action against its United Kingdom insurer Royal & Sun Alliance Insurance, PLC ("Royal & Sun"), seeking

a declaration that it is entitled to coverage for business income losses sustained as a result of the damage to its Liberty Plaza store and seeking damages for the insurers' alleged breaches of the United States and United Kingdom insurance policies.

The insurers Royal Indemnity and Royal & Sun (collectively, "Royal") now move for partial summary judgment and seek a ruling that based on the unambiguous policy language, the business interruption loss recovery is limited to the loss RBA sustained during the period that the store was actually closed plus an additional thirty days. Royal has already paid RBA a total of \$3,436,292 for the physical damage and business interruption losses in connection with this loss. RBA opposes the 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. For the foregoing reasons, the insurers' motion is granted.

Facts:

In September 2001, Marks & Spencer, a United Kingdom company, owned the retail clothing company Brooks Brothers. In December 2001, RBA purchased Brooks Brothers, which consists of approximately 235 stores. As a result of this purchase, RBA acquired the Liberty Plaza Brooks Brothers' insurance claim for business interruption coverage.

On September 11, 2001, the Brooks Brothers store in Liberty Plaza sustained extensive damage, forcing it to close its store and cease operations in that location for one year. On September 12, 2002, the Liberty Plaza Brooks Brothers store reopened, and the store continues to operate at that location. Royal reimbursed RBA for the costs of repairing the damage to the store and replacing the merchandise in the sum of \$2,415,443, and for the business interruption and extra expense loss RBA

sustained during that period in the sum of \$1,045,960.

Two insurance policies covered Marks & Spencer's operations in September 2001. The "Master Policy," issued by Royal & Sun, covered the worldwide operations, and the "Local Policy" issued by Royal Indemnity covered the United States operations (collectively, the "Policies"). The Policies complement each other in that the Local Policy provides the primary coverage in the United States, and the Master Policy fills any coverage "gaps" that may exist under the Local Policy. Both policies provide coverage for business interruption losses during the period of restoration and provide for limited business interruption coverage beyond the "period of restoration." Additionally, the Local Policy contains a provision for contingent property coverage, and the Master Policy provides coverage for restriction of store access and loss of attraction.

The Local Policy's business interruption losses provision provides:

BUSINESS INCOME - We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' or of tenancy during the 'period of restoration.' The suspension must be caused by direct physical loss of or damage to property at or within 500 feet of insured 'Premises and Location(s)'. The loss or damage must be caused by or result from a Covered Cause of Loss.

The Local Policy defines the "period of restoration" as the period of time that:

- a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at insured 'Premises and Location(s)'; and
- b. Ends on the date when the property at insured 'Premises and Location(s)' should be repaired, rebuilt or replaced with reasonable speed and similar quality.

The Local Policy provides for "extended business interruption coverage" for losses sustained after the property is "actually repaired, rebuilt or replaced and operations are resumed." That coverage ends on the earlier of 1) thirty days after the property has been repaired or 2) "the date [the insured] could restore [its] business, with reasonable speed, to the condition that would have existed

if no direct physical loss or damage occurred.”

The Master Policy also contains a business interruption coverage provision that provides:

The Insurers will pay the actual loss of Business Income sustained due to the necessary suspension of Operations during the Period of Restoration.
Provided that the suspension must be caused by the Incident.

The Master Policy defines “period of restoration” as “the period of time that a) begins with the date of the Incident and b) ends on the date when the property at the Premises should be repaired rebuilt or replaced with reasonable speed and similar quality.” The Master Policy defines “Incident” as “loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business.”

The Master Policy also provides extended business interruption coverage in the “Additional Cover” Section 1:

- 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.

The Local Policy provides coverage for contingent business interruption losses also known as dependent properties coverage:

We will pay for loss of Business Income or Extra Expenses at insured premises due to the necessary suspension of your ‘operations’ caused by or resulting from direct physical loss or damage by a Covered Cause of Loss to property of a person or firm which:

- (i) Supplies you merchandise or services; or
- (ii) Receives merchandise or services from you.

The Master Policy restriction of access and loss of attraction section provides:

Any loss as insured by Section 2 of this policy resulting from interruption of or interference with the Business in consequence of loss destruction or damage to property as undernoted shall be deemed to be an Incident.

Property in the vicinity of the Premises loss or destruction of or damage to which shall

- a) prevent or hinder the use of the Premises or access thereto
- b) cause a fall in the number of customers attracted to the vicinity of the Premises provided that the Maximum Indemnity Period shall not exceed 12 months whether the Premises or property of the Insured therein shall be damaged or not.

The Master Policy defines the "Indemnity Period" referenced in paragraph(b) as "the period beginning when the Incident occurs and ending when the results of the Business cease to be affected in consequence of the Incident but not exceeding the Maximum Indemnity Period stated in the Schedule."

The Local Policy excludes losses caused by "delay, loss of use, loss of market, indirect or consequential loss except as may be specifically covered by this Coverage Form."

Discussion:

The threshold issue in insurance contract interpretation is whether the language is plain or ambiguous. If the language is clear and unambiguous, the interpretation of the insurance policy terms is a question of law. *Town of Harrison v. National Union Fire Ins. Co.*, 89 N.Y.2d 308, 316 (1996). Here, the Local and Master Policies contained a number of provisions related to business interruption coverage. Each provision will be discussed.

Business Interruption Provision:

The Policies entitle RBA to business income coverage for losses sustained because of a "necessary suspension of operations" caused by "direct physical loss of or damage to property at or within 500 feet of insured 'Premises and Location(s)'" during the "period of restoration." Thus, the destruction of the WTC, the property at or within 500 feet of the One Liberty Plaza store, triggered

coverage, and the coverage lasted until the insured property was “repaired, rebuilt or replaced” on September 12, 2002. RBA argues that the reference to damage to nearby third party property must link the coverage to restoration of the WTC because otherwise the policy would contain unnecessary language. RBA’s argument is contrary to the plain meaning of the language. The provision does not entitle RBA to coverage for loss to a third party’s property. Rather, the business interruption coverage provision recognizes that loss to insured property may result from an incident that occurs in the vicinity of the insured property, and such injury at or near the insured premises will trigger coverage. In a similar situation where a business in the WTC with a similar policy sued its insurer for additional business interruption coverage tied to the reconstruction of the WTC, the United States District Court for the Southern District of New York found that the “period of restoration” lasted until the business resumed operations and not until the WTC was rebuilt. The court stated;

It is wholly unreasonable to think that the period of restoration should be tied to the rebuilding of real property over which neither the insured nor the insurer had any control, instead of tying it to the process that the plaintiff controlled: the acquisition of replacement office space and the installation of the plaintiff’s personal property in that space.

Streamline Capital, L.L.C. v. Hartford Casualty Ins. Co., 2003 WL 22004888 at *8 (S.D.N.Y. 2003).

When the triggering incident occurs, the business income provision states that coverage is conditioned on the “necessary suspension” of business and damage to its premises. “Necessary suspension” refers to “a total interruption or cessation of the insured’s business operations.” 54th *Street Ltd. Partners, L.P., v. Fidelity and Guaranty Ins. Co.*, 306 A.D.2d 67 (1st Dept. 2003). RBA’s business operations were suspended until its reopening date of September 12, 2002. RBA may not read a partial suspension or a loss of customer attraction into the business interruption provision when the language explicitly requires “necessary suspension” to trigger coverage.

Extended Business Interruption Coverage Provision:

Because business interruption coverage is tied to the period of restoration which ended on September 12, 2002, the next issue is the length of the extended business interruption coverage, which Royal concedes applies for the purposes of this motion. Royal has paid for an additional 30 days under the extended business interruption coverage provision in the Local Policy. RBA argues that it is entitled to a longer extension because the Master Policy applies, and it provides for extended business income loss coverage for up to 36 months after the “incident.” The Master Policy’s extended business income provision does not apply to this case because it only applies to losses caused by an incident *at the premises*, as opposed to income losses caused by damage to a third party’s premises, the World Trade Center Complex.

Contingent Business Interruption Provision:

The Local Policy’s contingent business interruption, also known as the dependent properties provision, does not apply to RBA’s losses caused by the WTC destruction. Although RBA contends it was dependent on the WTC for its income stream, it misconstrues the meaning of the dependent properties provision. The WTC does not constitute a “dependent property” within the meaning of the Local Policy because it is not a property that “supplies you [the insured] merchandise or services; or (ii) Receives merchandise or services from you [the insured].” The businesses in the WTC did not supply merchandise nor receive merchandise from Brooks Brothers. The fact that individuals that worked in the WTC also purchased clothing at Brooks Brothers does not render the WTC a “dependent property.”

Restriction of Access and Loss of Attraction Provisions:

The Master Policy’s “restriction of access” provision does not entitled RBA to additional

coverage beyond what Royal has already paid. Restriction of access coverage applies when damage caused to the property in the vicinity of the Brooks Brothers store “prevent[s] or hinder[s] the use of the Premises or access thereto.” Although RBA argues that the loss of a transportation hub and added barriers in the area hinder access, the current conditions in lower Manhattan do not prevent its customers from entering the store.

Additionally, the “loss of attraction” provision does not entitle RBA to additional coverage. RBA contends that it continues to suffer damage because the loss of customer traffic in lower Manhattan has negatively affected its sales, and the “incident” triggering coverage was not limited to September 11, but rather it took place over several months when contaminants filled the air as a result of the terrorist attacks. The “incident” as defined in the Master Policy is the date when the Liberty Plaza Brooks Brothers was damaged, and the “incident” began the running of the 12 month Maximum Indemnity Period pursuant to the Master Policy’s loss of attraction provision. Because Royal has already provided coverage for 13 months, Royal is not obliged to provide additional loss of attraction coverage.

A number of businesses that operated in the World Trade Center have brought actions against their insurers seeking business interruption coverage for losses sustained in connection with the September 11, 2001 terrorist attacks. Courts that have considered similar provisions have found that the coverage does not last until the WTC is rebuilt, but rather the coverage lasts until the business operations have resumed in the original or replacement location. *See Duane Reade Inc. v. St. Paul Fire and Marine Ins. Co.*, 411 F.3d 383 (2nd Cir. 2005); *Streamline Capital, L.L.C. v. Hartford Casualty Ins. Co.*, 2003 WL 22004888; *Lava Trading Co. v. Hartford Fire Ins. Co.*, 365 F.Supp.2d 434 (S.D.N.Y. 2005). The cases that RBA cites to the contrary are distinguishable because they

involved businesses located within the WTC whose operations were dependent upon their specific geographic locations. For example, in *Zurich American Ins. Co. v. ABM Industries*, 397 F.3d 158 (2nd Cir. 2005), the insured ABM, provided extensive janitorial, lighting, and engineering services at the WTC, and thus the court found it had an insurable interest in the common and leased premises at the WTC, and the policy's business interruption coverage provision provided coverage for their loss resulting from the WTC's destruction. In *Int'l Office Ctrs. Corp. v. Providence Washington Ins. Co.*, 2005 WL 2258531 (D.Conn. Sept. 16, 2005), upon which RBA relies, the insured's business provided temporary office space in the WTC, and its policy defined the covered property as "One World Trade Center, New York, NY 10048 Office." Thus, its "World Trade Center location was at the essence of [the insured's] business" and its coverage was linked to resuming its operations of providing temporary office space at the WTC.

This case is similar to *Duane Reade Inc. v. St. Paul Fire and Marine Ins. Co.*, 411 F.3d 383 (2nd Cir. 2005), where the policy at issue related to the business' 200 locations and not the specific WTC location, just as the Local and Master Policies in this case cover the Brooks Brothers 235 worldwide operations and not specifically the One Liberty Plaza location. Although the WTC created high customer traffic that translated to high profit margins for Duane Reade and Brooks Brothers, those businesses did not depend on the World Trade Center's existence. Both continue to operate in lower Manhattan, albeit realizing smaller profits.

Because the Local and Master Policies contain clear and unambiguous language and explicitly limits RBA's coverage to the period of restoration and 30 days of extended coverage,¹

¹Not only is RBA's contention that it is entitled to additional coverage belied by the explicit and unambiguous Policy language, it is also based on criteria that cannot be measured. The destruction of the WTC may only be one factor in RBA's profit decline. In the fall of 2001, RBA purchased Brooks Brothers from Marks &

* 11]
there is no need to examine the extrinsic evidence that RBA offers regarding possible ambiguities.

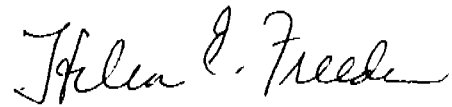
Accordingly, it is

ORDERED that Royal Indemnity Company's and Royal & Sun Alliance Insurance, PLC's motion for partial summary judgment is granted.

Parties are directed to appear for a preliminary conference on March 21, 2006 at 9:30 a.m. in room 208.

Dated: February 23, 2006

ENTER:



Helen E. Freedman, J.S.C.

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NEW YORK

Spencer and altered its marketing and business operations strategy. The decision to reopen its Liberty Plaza location rather than find a more profitable venue represented part of its decision to "rebuild by refocusing on Brooks' roots." Catherine Curan, "Suiting up on Sept. 12," *Crain's NY Business* (September 28, 2002). Although the terrorist attacks undoubtedly harmed the many businesses located in lower Manhattan, additional factors that contributed to the Liberty Plaza Brooks Brothers' economic condition may well reflect changes in the retail industry, the local and national economy, and RBA's business strategy.