

**Downtown Rest. Co., LLC v Firemen's
Ins. Cos.**

2007 NY Slip Op 31331(U)

May 17, 2007

Supreme Court, New York County

Docket Number: 0602848/2003

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PRESENT:

PART 55

Index Number : 602848/2003

DOWNTOWN RESTAURANT

vs

FIREMAN'S INSURANCE

Sequence Number : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

5/29/07

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

1-5

6-8

9-12

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached memorandum decision and order.

N.B. -- Pre-trial conference is scheduled for June 11, 2007 at 2 PM.

FILED

MAY 24 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated:

5/17/07

J.S.

JANE S. SOLOMON

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----x
DOWNTOWN RESTAURANT CO., LLC d/b/a
DOWNTOWN RESTAURANT c/o CIPRIANI USA,

Index No. 602848/03

Plaintiff,

DECISION AND ORDER

-and-

FIREMEN'S INSURANCE COMPANIES and/or
ADMIRAL INDEMNITY COMPANY,

Defendants.
-----x

FILED

MAY 24 2007

NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

In this action, plaintiff seeks to recover monetary damages from its property insurer for lost business arising from the September 11, 2001 attacks on the World Trade Center. The insurer defendants, Firemen's Insurance Company and/or Admiral Indemnity Company (collectively, Admiral), move for partial summary judgment dismissing that portion of plaintiff's complaint that seeks business income coverage, or alternatively, to limit the period for which plaintiff can recover on that claim to a maximum of 30 days. Admiral is not moving for summary judgment on its claim under the policy's Civil Authority Endorsement. Subsequent to the submission of the motion, plaintiff agreed that there is a 30-day limitation on the Extended Business Income coverage portion of the policy for the loss at issue. For the reasons stated below, the balance of Admiral's motion is denied.

Background

Admiral issued commercial lines insurance policy # 21-3-1423-31-02 (the policy) to plaintiff for the term of April 24, 2001 through April 24, 2002. The insured location on that policy is an upscale restaurant at 372-376 West Broadway, New York, New York, a bit more than a mile north of where the World Trade Center (WTC) stood prior to the September 11, 2001 attacks.

Prior to the attacks on the WTC, plaintiff served lunch and dinner daily. In its complaint, plaintiff alleges that after those attacks and the resultant collapse of the WTC buildings, the restaurant had no phone service or electrical power for a period of time, and the insured premises was covered in debris, soot, paper, and dust. According to plaintiff, it was forced to suspend all restaurant operations for a period of several days, and reopened only for lunch service on September 13.

Plaintiff contends that it reopened for lunch business despite the fact that the cleaning, debris removal, and mechanical repairs of the premises had not been completed and that there were few, if any, paying customers. It asserts that several weeks were needed to complete the repairs and clean the restaurant, and that it took three months to rebuild its business.

Admiral denied plaintiff's claim because the insured initially asserted that the restaurant had suffered no actual

4] damage, and when it later sought coverage for asserted direct damage, plaintiff did not provide the data sought by the insurer. Plaintiff subsequently initiated this action.

Discussion

In opposing this motion, plaintiff first claims that it is untimely, as the motion was filed beyond this court's 60-day post-Note of Issue deadline for dispositive motions, without a showing of good cause.

Timeliness of Summary Judgment Motion

"[A] party moving for summary judgment outside the statutory ... or court-imposed time limit must show good cause for the delay." Pena v Women's Outreach Network, Inc., 35 AD3d 104, 108 (1st Dept 2006); see also Brill v City of New York, 2 NY3d 648 (2004). This is true even when the motion is made within the 120-day statutory period (see CPLR 3212 [a]), but beyond a court's imposed deadline. See Glasser v Abramovitz, 37 AD3d 194 (1st Dept 2007); see also Mizell v Eastman & Bixby Redevelopment Co., LLC, 34 AD3d 770 (2d Dept 2006).

The August 8, 2005 Preliminary Conference Order herein states that dispositive motions be made "per ct rules." The Note of Issue having been filed on April 11, 2006, pursuant to this court's rules,¹ all dispositive motions were due in June, but the

¹ Rules of the Justices of the Supreme Court, Civil Branch, New York County.

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instant motion was not filed until August 9, 2006. Admiral's explanation is that on June 1, 2006 (within the requisite 60-day period following the filing of the NOI), a support person from the defendants' attorney's office telephoned chambers and spoke with a junior law clerk about the time period for dispositive motions; the response was that there was no rule contravening the CPLR 120-day time period. Defendants maintain that they relied on that communication and delayed the filing of the instant motion until August 9, 2006.

Although plaintiff is correct in pointing out that any such "good cause" must be laid out in the motion papers, and not in reply (see Cabibel v XYZ Associates, L.P., 36 AD3d 498 [1st Dept 2007]), defendants respond that they did not raise "good cause" at first because they relied on the above statements. Given the circumstances, specifically defendants' reliance a statement that well may have been made by a chambers employee with a one-year tenure who left at the end of August 2006, defendants' failure to raise "good cause" in their motion papers is excused, and the court will address the merits of the motion.

Summary Judgment

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

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"[I]t must clearly appear that no material and triable issue of fact is presented" (Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]; see also Giuffrida v Citibank Corp., 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Admiral seeks partial summary judgment dismissing plaintiff's business income claim, based upon plaintiff's failure to establish that the restaurant sustained direct physical damage, as was required under the policy.

Plaintiff was entitled to such coverage under two policy forms. First, the Business Income (and Extra Expense) Coverage Form (CP 00 30 06 95) of the policy states that Admiral "will pay for the actual loss of Business Income ... sustained due to the necessary suspension of ... 'operations' during the 'period of restoration.' The suspension must be caused by direct physical loss of or damage to property ... at the premises which are described in the Declarations." See Business Income (and Extra Expense) Coverage Form, Section A, Coverage. Additionally, plaintiff was entitled to coverage under the Restaurant Enhanced Coverage Endorsement (SP 90).²

² Coverage section 3.d.1. reads as follows:

if the necessary suspension of your "operations" produces a

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"[A] policyholder bears the initial burden of showing that the insurance contract covers the loss." Roundabout Theatre Co., Inc. v Continental Cas. Co., 302 AD2d 1, 6 (1st Dept 2002). "Where the provisions of [a] policy 'are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement.'" U.S. Fidelity & Guar. Co. v Annunziata, 67 NY2d 229, 232 (1986) (citing Government Emp. Ins. Co. v Kligler, 42 NY2d 863, 864 [1977]). The wording in the policy at issue herein is unambiguous, so absent proof of physical damage or loss, no business income coverage will be provided. See Roundabout Theatre Co., Inc., 302 AD2d at 6-7.

To fulfill its initial burden of showing that the policy at issue covers the loss, plaintiff has proffered an affidavit from Giuseppe Cipriani (Cipriani), the alleged owner of Cipriani USA, Inc., as well as the examination before trial (EBT) testimony from Dennis Pappas (Pappas), its CEO. Both claim personal knowledge of physical damage, in addition to the loss of

Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that: (a) begins on the date property ... is actually repaired, rebuilt, or replaced and "operations" are resumed; and (b) Ends on the earlier of: . . . (ii) 30 consecutive days after the date determined in (1)(a) above.

* * *

Loss of Business Income must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.

8]
power and telephone service.

Although Admiral asserts that this court should not consider either Cipriani's affidavit or the testimony of Pappas, both are in admissible form and are properly before the court for consideration. First, despite defendants' contention otherwise, Cipriani's affidavit is properly signed and notarized. Further, any arrest or charges filed against Pappas for insurance fraud, or any other crimes, goes to his credibility. "On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." S. J. Capelin Associates, Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 (1974); see also Baseball Office of Commr. v Marsh & McLennan, Inc., 295 AD2d 73 (1st Dept 2002).

While a fact-finder may find more persuasive the statements of Admiral's insurance adjuster, Plaintiff has sufficiently established questions of material fact that necessitate a trial.

There is no question that the policy language at issue is unambiguous. See Duane Reade, Inc. v St. Paul Fire & Marine Ins. Co., 279 F Supp 2d 235 (SD NY 2003), affd as mod 411 F3d 384 (2d Cir 2005). In policies with similar business income coverage language to the one at issue herein, courts have held that business income losses are limited to the period of time the insured was non-operational, i.e., during the period of time that

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there was a total cessation of business. See Royal Indem. Co. v Retail Brand Alliance, Inc., 33 AD3d 392 (1st Dept 2006); see also 54th Street Ltd. Partners, L.P. v Fidelity and Guar. Ins. Co., 306 AD2d 67 (1st Dept 2003).

Additionally, the First Department has recently considered business income coverage following the September 11, 2001 attacks in a policy with almost identical language that is at issue here. In that action, the court held that business income loss was restricted to the period necessary for the plaintiff to resume operations. The Court specifically held that "the restoration period is only as long as necessary for plaintiff to resume operations, as it is tied in to the requirement that there be a 'necessary suspension of your operations'" (Broad Street, LLC v Gulf Ins. Co., 37 AD3d 126, 134 [1st Dept 2006]; see also Admiral Indem. Co. v Bouley Intl. Holding, LLC, 2003 WL 22682273 [SD NY 2003]), and does not continue until an insured's income returns to that it experienced prior to the loss. See Royal Indem. Co. v Retail Brand Alliance, Inc., 33 AD3d 392 (1st Dept 2006); see also Children's Place Retail Stores, Inc. v Federal Ins. Co., 37 AD3d 243 (1st Dept 2007).

Accordingly, it hereby is

ORDERED that the defendants' partial summary judgment motion is denied; and it further is

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on June 11, 2007 at 2 PM.

Dated: May 17, 2007

ENTER:



J.S.C.

JANE G. SOLOMON

FILED
MAY 24 2007
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