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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

x

ALPHA PACKAGING INDUSTRIES INC.

- against -

CNA INSURANCE

x

Index Number 9810 2009

Motion Date December 1, 2010

Motion Cal. Number 1

Motion Seq. No. 3

The following papers numbered 1 to 12 read on this motion by defendant, Continental Casualty Company sued herein as CNA Insurance, for an order granting summary judgment dismissing the complaint pursuant to CPLR 3212 and granting summary judgment on its counterclaim to recover the sum of $60,000.00.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits (A-J).....	1-4
Opposing Affidavit - Affirmation - Exhibits (1-5).....	5-8
Reply Affirmations - Exhibits (A-F).....	10-12

Upon the foregoing papers the motion is determined as follows:

Continental Casualty Company sued herein as CNA Insurance (Continental), issued an insurance policy to Alpha Packaging Industries Inc. (Alpha), identified as Policy Number R2077919623, which provided coverage for business income loss caused by the mechanical breakdown of its equipment, for the period of January 1, 2007 through January 1, 2008.

On May 1, 2007, Alpha experienced an interruption of its business due to the mechanical breakdown of a Heidelberg press. Alpha made a claim to its insurer through its insurance broker, and Continental issued Alpha an advance check, dated August 1, 2007, in the sum of $60,000.00.

Alpha's president, David Zaret, entered into a confidential settlement agreement with Heidelberg USA, the manufacturer of the press, which he executed on June 8, 2008. The manufacturer's representative executed said settlement on June 18, 2008. The settlement provides, among other things, for the one time payment of an amount that exceeds the amount sought in this action, and includes a general release of all claims against Heidelberg.

On November 6, 2008, Alpha's public adjuster, Fairview Licht Company LLC, sent a letter to the insurer, along with certain documents in response to its demand for Sworn Proof of Loss, which states, in pertinent part, as follows:

> "Please be advised a $60,000.00 advance payment was issued based upon conversations with CNA's adjuster (Madeline Gilberti) and your forensic accountant Ed Pettit c/o Chakonis & Company. We calculated initially approximately seventeen days of lost business at a net revenue loss of about $5,600-$5,800 a day. The loss was well in excess of the advance payment issued, however the insured is not seeking any additional compensation from The CNA Insurance Company. Any arrangement or settlement the insured has made with the machine manufacturer initiating the loss, has been solely based on a loss of value consequently to this machine."

Christine Hanlon, Continental's counsel for the subrogation matter, in a letter addressed to Alpha and dated November 13, 2008, stated that:

> "it appears as though you are working out a settlement with the manufacturer of the subject machine....Our file indicates that shortly after the loss, $60,000.00 was advanced to your company. Please advise of the status of your claim and negotiations with Heidelberg. Please provide us with documentation of your complete loss and what you have been reimbursed from Heidelberg. If your loss was completely reimbursed by Heidelberg, then please return our advance of $60,000.00. If your settlement does not entirely reimburse your loss, please do not execute any releases which would prejudice our rights to pursue Heidelberg for subrogation and what we have paid out for the loss. Please advise our office of the status of the claim and your resolution with the manufacturer immediately."

Ms. Hanlon, in a letter addressed to Heidelberg dated November 13, 2008, stated that the matter had been referred to her office for subrogation, and further stated that

> "Shortly after our insured's loss, we advanced $60,000.00 to Alpha Packaging Industries. It is our understanding that Alpha Packaging is in the process of negotiating a settlement with you. Please advise of the status of the negotiations. In addition, we intend to pursue Heidelberg for subrogation for the $60,000.00 advanced to Alpha Packaging Industries."

Counsel for Heidelberg responded in a letter dated November 17, 2008, stating it had reached a settlement with Alpha; that it had received a release of all claims on behalf of Alpha; that the matter is subject to a confidentiality agreement; and that Ms. Hanlon should contact Alpha or its attorney for more information.

Alpha's initial proof of claim was rejected by the insurer on November 13, 2008 due to a lack of complete documentation. In a letter dated November 20, 2008, Ms. Hanlon requested that Alpha forward a copy of the lease to her so that the insurer could evaluate its position, and requested complete documentation of Alpha's loss and what it had been reimbursed by Heidelberg.

Alpha, in response, submitted to the insurer a sworn statement of proof of loss dated December 30, 2008, in which it claimed its whole loss and damage was $176,914.00 based upon an analysis prepared by its accountants and claimed that the amount due under the policy was $84,736.00. Alpha included a schedule which it used to calculate the actual cash value of its loss at $179,914.00, less a deductible calculated as $32,178.00, less the advance payment of $60,000.00, which is equal to $84,736.00.

Ms. Hanlon, in a letter addressed to Alpha and David Zaret and dated February 10, 2009, stated that:

> "We have been advised that you settled a claim with the manufacturer of the subject machine....Our file indicates that after the loss, $60,000.00 was advanced to your company. We have been advised by counsel to Heidelberg that you settled this claim with Heidelberg. We were further advised by counsel that a release was executed and the settlement is subject to a confidentiality order."
>
> "Pursuant to the policy 'if any person or organization to or for whom we made payment under this coverage part has rights to recover damages from another, those rights are transferred to us to the extent that person or organization must

> do everything necessary to secure our rights and must do nothing after a loss to impair them' (see, Page 8 of your policy). Thus, our payment to you under the policy transferred to us rights to subrogate against Heidelberg for the same amount. Your execution of a release has prejudiced our rights of subrogation as against them."
>
> "Pursuant to the insurance policy under which you made a claim you must cooperate with us in the investigation and further cooperate with us in the settlement of the claim."
>
> "Your settlement of the claim with Heidelberg and execution of a release has undoubtedly prejudiced our rights to pursue them for subrogration. Your execution of the release was in violation of your obligation to cooperate under the policy."
>
> "Your execution of a release and settlement of your claim against Heidelberg without our consent constitutes a violation of the policy."

Continental, in a letter addressed to Alpha and dated March 31, 2009, stated, in pertinent part, as follows:

> "This letter will serve as an acknowledgment of CONTINENTAL CASUALTY CO's decision that it does not intend to pursue subrogation of the above claim. As a result, if you believe that a third party is completely or partially responsible for any losses that are not covered by insurance relating to the incident, it will be your responsibility to pursue any avenues you so desire to recoup the losses you have claimed."

Alpha commenced the within action for breach of contract on April 15, 2009 and alleges that the insurer improperly rejected its claim for business interruption loss arising out of the May 1, 2007 mechanical breakdown of the printing press, and seeks to recover the sum of $116,914.00. Plaintiff alleges that it sustained "a loss for business and other damages as a result of the mechanical breakdown in the sum of $179,914.00," and that it received an advance of $60,000.00 from the defendant insurer.

Defendant Continental has served a verified answer which interposes 11 affirmative defenses and a counterclaim to recover the sum of $60,000.00, based upon Alpha's entering into the confidential settlement agreement without the insurer's knowledge or consent. It is alleged that Alpha thereafter refused to disclose said settlement agreement to Continental,

in violation of the insurance policy, and that said settlement with the manufacturer impaired the insurer's right of subrogation.

Alpha served a verified reply to the counterclaim, and interposed the single affirmative defense of failure to state a cause of action.

Alpha, in its first amended response to the first set of interrogatories, dated April 27, 2010, stated that with respect to the claimed business interruption loss, it had lost the sum of $176,914.00, as calculated by its public adjuster and accountants; that this figure was based upon Alpha's prior daily sales which generated a profit of $10,726.00 a day; that on April 17, 2007 it discovered a problem with the press which resulted in its being inoperable on numerous days; that when the press was operable, it would only operate by manually adding oil and at a reduced speed, which substantially increased Alpha's labor costs, and that these costs are included in its damages

Counsel for the parties entered into a confidentiality stipulation dated June 3, 2010, at which time Alpha provided the insurer's counsel with a copy of the confidential settlement agreement it had entered into with the manufacturer, in June 2008. The confidential settlement has been submitted to the court for in camera review.

At the outset, plaintiff's objections to the affirmation submitted by defendant's counsel in support of the within motion, are rejected. The affirmation of Continental's counsel is the appropriate vehicle for the submission of the exhibits annexed to the within motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]; *Olan v Farrell Lines*, 64 NY2d 1092, 1093 [1985]; *State of New York v Grecco*, 43 AD3d 397 [2007]). Moreover, defendant's present counsel has personal knowledge of the attempts made by Continental since March 30, 2009 to obtain a copy of the settlement entered into by Alpha and Heidelberg.

It is well settled that "[t]he 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" (*Howard Stores Corp. v Foremost Ins. Co.*, 82 AD2d 398, 400 [1981], *affirmed for reasons stated* 56 NY2d 991 [1982]). Here, the parties' insurance policy for equipment breakdown coverage, provides, in pertinent part, as follows:

"E. Equipment Breakdown Protection Conditions

The following conditions apply in addition to the Common Policy Conditions:

...

k. Transfer of Rights of Recovery Against Others To Us

> If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them...."

It is undisputed that Alpha sustained a business interruption on May 1, 2007 due to a mechanical breakdown of its Heidelberg press. Alpha filed a claim with Continental and received a cash advance of $60,000.00 on August 3, 2007. Alpha, without providing any notice whatsoever to Continental, also pursued the matter with Heidelberg USA, the manufacturer of the press. On June 9, 2008, Alpha's president, David Zaret, executed a confidential settlement agreement with the manufacturer, whereby it received a one time payment, which exceeds the gross amount claimed as business interruption loss, as well as other benefits. The confidential settlement also includes a broad general release.

Alpha's assertion that Continental was on notice that the payments made by Heidelberg to Alpha under the confidential settlement agreement were based upon a "loss of value to the printer," and not for business interruption loss, is rejected. Alpha did not inform its insurer that it had entered into a settlement agreement containing a release until November 6, 2008, nearly five months after its execution. Moreover, Continental was not required to rely upon Alpha's characterization of the terms of the settlement agreement and release. Since Continental did not obtain a copy of the confidential settlement agreement until June 3, 2010, during the course of this action, it could not have been aware of the actual terms of said agreement prior to the commencement of this action.

The confidential settlement agreement is a contract and the rules of contract interpretation are well-established. When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms, and courts may not "by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [internal quotation marks and citation omitted]). The confidential settlement agreement provided that the manufacturer would make a one time payment in a certain amount to Alpha upon the execution of the agreement. The agreement is silent at to what the compensation encompassed. Therefore, as the agreement does not state that the compensation paid to Alpha was solely based on a loss in the value of the printer, the court will not read this term into said agreement. Contrary

to Alpha's assertions, no issues of fact exist with respect to the terms of the confidential settlement agreement.

A release is a contract, and its construction is governed by contract law (*see Mangini v McClurg*, 24 NY2d 556, 562 [1969]; *Record v Royal Globe Ins. Co.*, 83 AD2d 154, 159 [1981]). As a general rule, when a release is clear and unambiguous on its face and knowingly and voluntarily entered into, it will be enforced as a private agreement between the parties (*see Mangini v McClurg*, *supra*; *Thailer v LaRocca*, 174 AD2d 731 [1991]; *Appel v Ford Motor Co.*, 111 AD2d 731 [1985]; *Touloumis v Chalem*, 156 AD2d 230 [1989]). A release will not be treated lightly and will be set aside by a court only for duress, illegality, fraud, or mutual mistake (*see Mangini v McClurg*, *supra* at 563; *Touloumis v Chalem*, *supra*; *Matter of O'Hara*, 85 AD2d 669 [1981]). In the absence of these factors, if the language of the waiver is clear and unambiguous, the claim by one party that it intended something else is insufficient to vitiate the waiver's force and effect (*see Thailer v LaRocca*, *supra*; *Langer v Krivitzky*, 147 AD2d 687 [1989]). However, " 'if from the recitals therein or otherwise, it appears that the release is to be limited to only particular claims, demands or obligations, the instrument will be operative as to those matters alone' " (*Perritano v Town of Mamaroneck*, 126 AD2d 623, 624 [1987], quoting 49 NY Jur, Release and Discharge § 33 at 405). Indeed, "the meaning and coverage of a general release necessarily depends upon the controversy being settled and upon the purpose for which the release was given. A release may not be read to cover matters which the parties did not intend to cover" (*Gale v Citicorp*, 278 AD2d 197 [2000]; *see Kaminsky v Gamache*, 298 AD2d 361, 361-362 [2002]).

Here, the release given to the manufacturer was incorporated into the settlement agreement that was intended to resolve Alpha's claims arising out of the mechanical breakdown of the Heidelberg press. It is a full general release, whereby the parties mutually released each other from, among other thing, any and all claims and losses, including claims for lost profits or income, and incidental or consequential damages arising from the subject equipment. Therefore, contrary to Alpha's assertion, the compensation paid by the manufacturer to Alpha constituted payment in full for all claims arising out of the mechanical breakdown of the equipment, including business interruption losses, and was not limited to the "value of the press" to Alpha.

Generally, where an insured executes a general release in favor of a tortfeasor without reserving the rights of its insurer, the former is said to have impaired the latter's right of subrogation, and thereby relieves the insurer of any further liability under the policy (*see Aetna Cas. & Sur. Co. v Schulman*, 70 AD2d 792 [1979], *mot for lv to appeal denied* 48 NY2d 608 [1979]; *Davies v Nationwide Mut. Ins. Co.*, 99 Misc 2d 899 [1979]; *see generally* 16 Couch, Insurance 2d § 61:190 *et seq.*). Here, as the release given by Alpha to the manufacturer did not reserve any rights of its insurer, Continental, it prejudiced

Continental's right of subrogation under the insurance policy. Continental, thus, in its letters of February 10, 2009 and March 30, 2009, informed Alpha that as the confidential settlement and release had prejudiced its right to seek subrogation under the insurance policy, it would not seek subrogation.

An equitable right of subrogation exists where a third party tortfeasor obtains a release from an insured with knowledge that the latter has already been indemnified by the insurer or with information that, reasonably pursued, should give him knowledge of the existence of the insurer's subrogation rights, such release does not bar the insurer's right of subrogation (*see New York Cent. Mut. Fire Ins. Co. v Hildreth*, 40 AD3d 602 [2007]; *Aetna Cas. & Sur. Co. v S. Siskind & Sons, Inc.*, 209 AD2d 215 [1994]; *Aetna Cas. & Sur. Co. v Schulman*, *supra*; *Silinsky v State-Wide Ins. Co.*, 30 AD2d 1 [1968]). Otherwise, a release would operate as a fraud upon the insurer.

Alpha has failed to present any evidence that the manufacturer had any knowledge of the payment it received from Continental or any information with respect to said payment. Rather, Alpha claims that Continental waived its right to seek a return of the $60,000.00, when it determined that it could not pursue a right of subrogation under the policy. Continental's inability to seek subrogation under the policy, however, did not constitute a waiver of its right to seek a return of the payment made to the insured. Therefore, Alpha is required to return the $60,000.00 it received from Continental, as it is not entitled to be paid twice for the same loss (*see Weinberg v Transamerica Ins. Co.*, 62 NY2d 379 [1984]; *L & K Holding Corp. v Tropical Aquarium*, 192 AD2d 643, 644-645 [1993]; *Sinicropi v McCabe*, 125 AD2d 562 [1986]; *State Farm Mut. Auto. Ins. Co. v Taglianetti*, 122 AD2d 40 [1986]; *Blacharsh v Hartford Ins. Group*, 104 AD2d 839 [1984]; *Record v Royal Globe Ins. Co.*, *supra* at 154; *Aetna Cas. & Sur. Co. v Schulman*, *supra*).

Accordingly, Continental's motion for summary judgment dismissing the complaint is granted, and its request for summary judgment on its cross claim to recover the $60,000.00 payment from Alpha is granted.

Dated: March 7, 2011

J.S.C.