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SHORT FORM ORDER

INDEX No. 11-9539

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2/28/13
ADJ. DATES 4/19/13
Mot. Seq. # 001- MG; CDisp
Mot. Seq. #002 - XMD
CDISP Y XX N ____

TRIPLE DIAMOND CAFÉ, INC. d/b/a THE RARE OLIVE, Plaintiff, -against- THOSE CERTAIN UNDERWRITERS AT LLOYD'S LONDON, Defendant.	LERNER, ARNOLD & WINSTON Attys. For Plaintiff 475 Park Ave. So. New York, NY 10016 COZEN, O'CONNOR Attys. For Defendant 45 Broadway New York, NY 10006

Upon the following papers numbered 1 to 11 read on this motion and cross motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers 4-7 ; Answering Affidavits and supporting papers ; Reply papers 8-11 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the defendant for summary judgment dismissing the complaint in this action to recover damages by reason of the defendant's purported breach of a commercial building loss insurance policy is considered under CPLR 3212 and Insurance Law § 3106 and is granted; and it is further

ORDERED that the cross motion (#002) by the plaintiff for summary judgment on an unpleaded claim for reformation of the subject insurance policy is considered under CPLR 3212 and is denied.

From February 23, 2010 through February 23, 2011, the plaintiff's business located in a commercial building at 400 West Jericho Turnpike in Huntington New York was insured under a policy issued by the defendant. On April 1, 2010, fire broke out and severely damaged the leasehold premises which housed the plaintiff's café. The fire also damaged an adjacent business housed in the same building. Police were summoned on or about 3:30 a.m. by an eyewitness who saw smoke. Fire

department personnel reported that the back door of the plaintiff's business had been freshly damaged by tools. Although the rear door was closed, it was unlocked and was easily opened by fire department personnel who found the building to be unoccupied. The arson squad was called and the fire was labeled incendiary in nature due to the presence of ignitable liquids on the floor of both levels of the plaintiff's café. The arson investigation remains open, as no arrests have yet been made.

By letter dated September 3, 2010, the defendant denied coverage to the plaintiff under the terms of the Declarations page, Item numbered 5 entitled, Forms and Special Conditions. The Declarations page is attached to the Certificate and it includes the following warranty: "Warranted Automatic extinguishing system and hood and duct cleaning, central station fire and burglar alarms will be Fully operational throughout the period of the policy". In March of 2011, the plaintiff commenced this action by the filing of its summons and complaint. Therein, the plaintiff asserts one cause of action sounding in breach of the policy by the defendant. Issue was joined by service of the defendant's answer in which some twelve affirmative defenses are advanced.

By the instant motion, the defendant moves for summary judgment dismissing the complaint on the grounds that it is without liability to the plaintiff by virtue of the plaintiff's breach of the above quoted warranty due to its failure to maintain a fully operational central station fire and burglar alarm systems. The plaintiff cross moves for summary judgment on an unpleaded claim for judicial reformation of the policy by which the central station fire alarm warranty is removed therefrom. In its reply papers, the defendant limits its breach of warranty claim to the plaintiff's failure to maintain a fully operational burglar alarm due the failure of one its principals to set the alarm as she left the premises on the evening before the early morning fire of April 1, 2010.

The cross motion by the plaintiff for a judicial reformation of the policy so as to delete the warranty set forth on the Declarations page may be fairly read as aimed solely at the central station fire alarm provisions of such warranty. The defendant's withdrawal of those portions of its summary judgment motion that were premised upon the central station fire alarm warranty provisions rendered the plaintiff's cross motion for reformation, academic. For these reasons the court denies plaintiff 's cross motion for a summary judgment on its unpleaded claim for policy reformation. The court shall, however, read the remaining portions of the plaintiff's cross moving papers (*see* sections c, d, e and f of the affirmation of Jonathan C. Lerner, Esq.), as opposition to the defendant's now limited application for dismissal of the complaint on the ground that the plaintiff's failure to set the burglar alarm on the night of the fire constituted a breach of the "fully operational" central station burglar alarm provisions of the subject warranty. For the reasons stated, the plaintiff's motion is granted.

Section 3106(a) of the Insurance Law defines a warranty as follows: any provision of an insurance contract which has the effect of requiring as a condition precedent of the taking effect of such contract or as a condition precedent of the insurer's liability thereunder, the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract. Except as to marine insurance, which is expressly exempt under Insurance Law § 3106(c), a warranty is part of the insurance contract itself, either as an express provision in the policy or by explicit incorporation by reference (*see* Insurance Law

§ 3204). An insurer's defense that is predicated upon the insured's purported breach of a warranty will fail absent proof that the breach materially increased the risk (*see* ***Anjay Corp. v Those Certain Underwriters at Lloyd's of London***, 33 AD3d 323, 822 NYS2d 249 [1st Dept 2006]). Where the insurer satisfies that burden, a breach of a warranty precludes coverage as a matter of law (*see* ***Star City Sportswear, Inc. v Yasuda Fire & Marine Ins. Co. of Am.***, 1 AD3d 58, 765 NYS2d 854, *aff'd*, 2 NY3d 789, 781 NYS2d 255 [2004]).

Whether a warranty exists is generally a question of law since interpretation of the language of the contract is generally a question of law for the court to determine (*see* ***Vigilant Ins. Co. v Bear Stearns Cos., Inc.***, 10 NY3d 170, 177, 855 NYS2d 45 [2008]; ***Chimart Assoc. v Paul***, 66 NY2d 570, 572–573, 498 NYS2d 344 [1986]; ***L&D Serv. Sta., Inc. v Utica First Ins. Co.***, 103 AD3d 782, 962 NYS2d 187 [2d Dept 2013]; ***Star City Sportswear, Inc. v Yasuda Fire & Marine Ins. Co. of Am.***, 1 AD3d 58, *supra*). Here, the court finds that item 5 of the Declarations page which provides "Warranted Automatic extinguishing system and hood and duct cleaning, central station fire and burglar alarms will be Fully operational throughout the period of the policy"constitutes a warranty on the part of the plaintiff within the purview of Insurance Law § 3106 (*see* ***Irv-Bob Formal Wear, Inc. v Public Serv. Mut.***, 81 Misc2d 422, 366 NYS2d 596 [NYC Civ. Ct. 1975], *aff'd* 86 Misc2d 1006, 383 NYS2d 832 [App. Term 1976]). The plaintiff's claim that the defendant's failure to amplify the warranty in a Protective Safeguard Endorsement is thus rejected as unmeritorious.

A review of the record evidence adduced on these motions reveals that it contains due proof that the central station burglar alarm system was not operational on the night of the fire because one of the plaintiff's principals did not set the alarm after she left the café at around 8:00 p.m. on the evening before the early morning fire. The deposition testimony of such principal contains no testimony denying that the alarm was not set and her failure to recall whether she set the alarm after leaving the unoccupied café on the evening before the fire does not give rise to a question of fact.

That the failure to set the alarm materially increased the risk as required by Insurance Law § 3106 is not disputed. What is in dispute and hotly contested is whether the failure to set the alarm constituted a breach of the warranty's requirement that it be "fully operational". For the reasons set forth below, the court finds that it does.

Well established principles governing the interpretation of insurance contracts provide that unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning and that the interpretation of such provisions is a question of law for the court (*see* ***Chimart Assoc. v Paul***, 66 NY2d 570, 572–573, *supra*; ***L&D Serv. Sta., Inc. v Utica First Ins. Co.***, 103 AD3d 782, *supra*; ***2619 Realty v Fidelity & Guar. Ins. Co.***, 303 AD2d 299, 300, 756 NYS2d 564 [2003]; ***Mazzuoccolo v Cinelli***, 245 AD2d 245, 246–247, 666 NYS2d 621 [1997]). When interpreting a policy, the court "'may not make or vary the contract of insurance to accomplish [its] notion of abstract justice or moral obligation'" (***Teichman v Community Hosp. of W. Suffolk***, 87 NY2d 514, 520, 640 NYS2d 472 [1996], *quoting* ***Breed v Insurance Co. of N. Am.***, 46 NY2d 351, 355, 413 NYS2d 352 [1978]). The court is further precluded from creating policy terms by implication and from rewriting an insurance contract. Nor may it disregard the provisions of an insurance contract

which are clear and unequivocal or accord a policy a strained construction merely because that interpretation is possible (*see* ***Broad St., LLC v Gulf Ins. Co.***, 37 AD3d 126, 832 NYS2d 1 [1st Dept 2006]; ***Bretton v Mutual of Omaha Ins. Co.***, 110 AD2d 46, 49, 492 NYS2d 760 [1985], *affd.* 66 NY2d 1020, 499 NYS2d 397 [1985]). An insurer is no less entitled than other contracting parties to have its contract of insurance enforced in accordance with its provisions and without a construction contrary to its express terms (*see* ***Broad St., LLC v Gulf Ins. Co.***, 37 AD3d 126, *supra*). Only where the terms of policy may fairly be characterized as ambiguous may the court resort to long standing rules of construction to ascertain the intent of the parties.

A contract is unambiguous if the language has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (***Breed v Insurance Co.***, 46 NY2d at 355, *supra*). The test for ambiguity is whether the language of the insurance contract is "susceptible of two reasonable interpretations"(***State of New York v Home Indem. Co.***, 66 NY2d 669, 671, 495 NYS2d 969 [1985] [internal quotations omitted]; ***Essex Ins. Co. v Vickers***, 103 AD3d 684, 959 NYS2d 525 [2d Dept 2013]). When terms are clear, unequivocal and understandable when read in connection with the whole contract, the mere assertion by one claiming that the language employed means something else is insufficient to raise a question of fact (*see* ***Bethlehem Steel Co. v Turner Constr. Co.***, 2 NY2d 456, 460, 161 NYS2d 90 [1957]). The fact that a term is undefined in the policy does not warrant a finding that it is ambiguous and a non-sensical meaning ascribed to it by a party claiming an ambiguity such that it would nullify the warranty may be properly rejected by the court called up to construe such a warranty (*see* ***Slattery Skanska Inc. v American Home Assur.*** *Co.* 67 AD3d 1, 885 NYS2d 264 [1st Dept 2009]).

Here, the court rejects the plaintiff's claim that the warranty provisions at issue are ambiguous and thus preclude an award of summary judgment as demanded by the defendant. Any interpretation of the term "fully operational" that would exclude a failure to set an otherwise working central station burglar alarm would be unreasonable as it would nullify the warranty. The failure to set a burglar alarm has been held to constitute a breach of a warranty to maintain a burglar alarm system at the insured premises (*see* ***Litzman v Metropolitan Cas. Ins. Co.***, 278 AD 853, 105 NYS2d 361 [2d Dept 1951]; ***Lee v Preferred Acc. Ins. Co. of New York,*** 216 AD 453, 215 NYS 366 [1st Dept 1926]; *see also* ***Phoenix Ins. Co. v Ross Jewelers, Inc.,*** 362 F.2d 985 [5th Cir 1966]; ***Matusek Academy of Music, Inc. v National Sur.,*** 210 F.2d 333 [7th Cir 1954]; ***Brookwood, LLC v Scottsdale Ins. Co.***, 2009 WL 2525756 [E.D. La. 2009]; ***J.E.M., Inc. v Seneca Ins. Co., Inc***., 2007 WL 987543 [D. Conn.2007]; ***Certain Underwriters at Lloyd's London v The Warehouse, Inc***., 2002 WL 31890931[E.D.La.. 2002]; ***Wabash Prop. v Transport Indem. Co.***, 1985 WL 2452 [N.D. Ill. 1985]; ***Mangiacotii v U.S. Liability Co.***, 61 Mass. App. Ct. 1124 [2004]; ***Star Variform Corp of Am. v Buffalo Reinsurance, Co.***, 307 SE 2d 193 [N.C. 1983]; ***SFI, Inc. v U.S. Fire Ins. Co.***, 453 F.Supp. 502 [M.D.,1978], *aff'd.* 634 F2d 879 [5th Cir. 1981]). While there is authority that suggest a contrary result, the court declines to adopt the reasoning employed by the these courts (*see* ***Prendergast v Pacific Ins. Co., Ltd.***, 2012 WL 1044568 [W.D. N.Y. 2012]); ***Five Star Hotels, LLC v Insurance Co. of Greater New York***, 2011 WL 1216022 [S.D.N.Y.2011]; ***Ocean Walk Ltd. v Those Certain Underwriters at Lloyd's London***, 2006 WL 2689626 [E.D.N.Y. 2006]).

Finally, the court rejects the plaintiff's claim that the defendant's motion is premature within the contemplation of CPLR 3212(f) due to the failure to complete pre-trial discovery proceedings. The rule at CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just".

Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (***Martinez v Kreychmar***, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see* ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]; ***Essex Ins. Co. v Carpentry***, 74 AD3d 733, 904 NYS2d 78 [2d Dept 2010]). Here, the plaintiff failed to make such a showing and its "'mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered' by further discovery is an insufficient basis for denying the motion" (***Hanover Ins. Co. v. Prakin***, 81 AD3d 778, 916 NYS2d 615 [2d Dept 2011]; ***Woodard v Thomas***, 77 AD3d 738 at 740, 913 NYS2d 103 [2d Dept 2010]; ***Essex Ins. Co. v Carpentry***, 74 AD3d 733, *supra*).

In view of the foregoing, the plaintiff's cross motion (#002) is denied while the defendant's motion-in-chief (#001) for summary judgment dismissing the complaint is granted. The defendant shall settle a judgment upon a copy of this order.

DATED: 5/2/13

THOMAS F. WHELAN, J.S.C.