Flat Ridge 2 Wind Energy LLC v Those Underwriter at Lloyd's
2014 NY Slip Op 31804(U)
June 30, 2014
Supreme Court, New York County
Docket Number: 650508/2014
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

FLAT RIDGE 2 WIND ENERGY LLC, Plaintiff, -against- THOSE UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO CERTIFICATE NUMBER W1114133901, INCLUDING LLOYDS SYNDICATE 510, LLOYDS SYNDICATE 2987, LLOYDS SYNDICATE 2623, LLOYDS SYNDICATE 623, LLOYDS SYNDICATE 2121, LLOYDS SYNDICATE 5000, LLOYDS SYNDICATE 3000, LLOYDS SYNDICATE 1084, LLOYDS SYNDICATE 609, LLOYDS SYNDICATE 5151, LLOYDS SYNDICATE 2003, LLOYDS SYNDICATE 1200, LLOYDS SYNDICATE 4020, LLOYDS SYNDICATE 33, LLOYDS SYNDICATE 1036, LLOYDS SYNDICATE 1969, LLOYDS SYNDICATE 1861, LLOYDS SYNDICATE 807, Defendants.	Index No. 650508/2014 DECISION AND ORDER Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

Plaintiffs bring a breach of contract cause of action related to denial of an insurance claim by defendants. Defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1) on the grounds that the contract plaintiff, Flat Ridge 2 Wind Energy LLC, sued upon provides that any action against the defendants must be initiated within twelve months of the occurrence at issue and plaintiff's complaint was filed beyond the agreed contractual limitations period. Defendants' motion is denied.

Background

The following facts are drawn from the complaint and are taken as true, with all reasonable inferences drawn in favor of the plaintiff for the purposes of this Motion to Dismiss.

In exchange for Flat Ridge 2 Wind Energy LLC's (Flat Ridge 2) payment of a $1.8 million premium, Underwriters at Lloyd's, London (Underwriters) issued Wind Pro Insurance Policy Certificate Number WI114133901 (Policy) to Flat Ridge 2 through their designated agent and representative, GCube Underwriting Limited (GCube). The Policy was designed specifically for the wind power generation industry. It is the "gold standard for comprehensive transit, construction and operational all risks coverage for a renewable energy project's life cycle from the development throughout commercial operations."

The Policy insures a 66,000 acre wind farm in Barber, Harper, Kingman, and Sumner Counties, Kansas (the Wind Farm). The Wind Farm consists of 204 GE Wind Turbine Generators, which the Policy insures by specifying that insured property includes "all Wind Turbine Generators."

The Policy also contains a contractual limitation clause, which is the premise for Underwriters' motion. This clause states:

> Action Against Underwriters
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> No suit or action on this Policy for the recovery on a claim shall be sustainable in any court of law or equity, unless the insured shall have fully complied with all of the requirements of this Policy, nor unless commenced within twelve (12) months next after the happening becomes known to the Insured, unless a longer period of time is provided by applicable statute.

On May 19, 2012, a tornado struck the Wind Farm and surrounding areas. As a result of the tornado, the Wind Farm, including several Wind Turbine Generators, suffered substantial damage and loss.

Flat Ridge 2 provided timely notice of the claim to Underwriters on May 20, 2012. On November 1, 2013, the adjustor for the loss, Pat Jeremy from Power Gen Claims LLC, wrote to Underwriters detailing the extent of the damage he found to be suffered by Flat Ridge 2 and his recommended course of action going forward. In this letter, Mr. Jeremy described the "considerable damage" he found to each of the Wind Turbine Generators and the future repairs and replacements that would be needed. Mr. Jeremy told Underwriters that Flat Ridge 2 had "submitted a partial claim for some of the work that had been accomplished to date," in the amount of $9,728,755.38. Mr. Jeremy also told Underwriters that Flat Ridge 2 had estimated its total loss "in excess of $12M." As a result, Mr. Jeremy advised Underwriters that their reserve for payment of the claim "may have to be increased." At that time, Mr. Jeremy recommended a partial payment of $3,500,000.

On December 14, 2013, Flat Ridge 2 submitted a partial proof of loss for $3,500,000. Underwriters paid $3,500,000 to Flat Ridge on January 24, 2013.

On February 18, 2013, after their partial payment of $3,500,000, Underwriters told Flat Ridge 2 that the "property did not suffer a covered cause of loss," and, therefore, they must "deny the claim." This was Underwriters' first denial of the claim.

Between April 2013 and June 2013, the parties corresponded regarding Underwriters' coverage position. On June 21, 2013, Flat Ridge 2 submitted a Partial Proof of Loss for $3,750,000; Underwriters paid this amount on July 19, 2013.

On September 20, 2013, Kirk Pasich, counsel for Flat Ridge 2, asked Underwriters to withdraw their coverage position and "fully acknowledge coverage." He stated that if Underwriters had any hesitation in fully acknowledging coverage, "Flat Ridge 2 would welcome the opportunity to meet in an effort to resolve any differences, including mediation."

On October 28, 2013, GCube wrote on behalf of Underwriters stating that Underwriters were "still reviewing the documents on this claim," and "need[ed] additional time to consider the information presented. . . ." On November 20, 2013, Roy Munoz, the GCube Claims Manager for Flat Ridge 2's claim and Underwriters' representative, wrote to Mr. Pasich, stating, "Underwriters have not denied coverage for the loss, but rather have accepted unallocated Proofs of Loss totaling $7.5 and have paid $7.25 million after application of the $250,000 policy deductible."

In that same November 20, 2013 letter, Mr. Munoz stated that Underwriters would

> welcome a meeting for the purpose of attempting to conclude the Assured's claim. We suggest it may be helpful to include the representatives of the Assured's and Underwriters inspection teams, as well as the parties' respective counsel. We look forward to your suggested timing and location for such meeting and working with the Assured and yourselves to conclude this matter.

Following the November 20, 2013 letter, Flat Ridge 2 made multiple attempts to schedule a meeting. Underwriters did not provide a date to meet right away, but continued to state that they wanted to meet to attempt to resolve the matter. For example, on December 16, 2013, Mr. Munoz wrote to Mr. Pasich, stating that Underwriters were "keen to resolve sooner rather than later and I believe we should aim for a date in January." Following Mr. Munoz's December 16, 2013 letter, Mr. Pasich sent correspondence to Mr. Munoz twice, on January 7 and January 17, 2014, inquiring into a meeting time, but Underwriters did not respond to those inquiries at that time.

On January 13, 2014, Mr. Munoz sent an e-mail to Mr. Pasich, stating that Underwriters would "like to take a second look [at the property] in order to reassess the validity of GE's assertion that the Property was damaged and therefore necessitated repair." Mr. Munoz did not address Flat Ridge 2's requests to schedule a meeting at that time.

On February 4, 2014, Mr. Pasich sent an e-mail to Mr. Munoz detailing Flat Ridge 2's repeated requests to schedule a meeting. In the February 4, 2014 email, Mr. Pasich stated:

> Although I understand that the claims adjuster reached out directly to Flat Ridge 2 regarding the re-examination, I have not received the courtesy of a response to my question regarding the re-examination or my repeated requests to set a date for a meeting – a meeting that you professed Underwriters were "keen" to have and that you said you were aiming to have in January. It is now more than four months since we first requested a meeting and more than two months since you first said that Underwriters would welcome a meeting. There is no reason for this delay. Therefore, we ask that you provide dates for a meeting in Houston, Texas, at BP between now and March 7, 2014. Meanwhile, we can discuss the visits that the adjuster has requested to re-examine the property. We also ask, as I did in my January 17, 2014, e-mail, that you advise as to the reason for the re-examination.

In the same February 4, 2014 e-mail, Mr. Pasich requested that Underwriters confirm New York's six-year statute of limitations applied to the claim. He stated:

> Finally, we note that on February 18, 2013, GCube first sent a coverage letter declining coverage for the portions of the loss that are now the subject of discussion between the parties. The policy contains the following provision:
>
> No suit or action on this Policy for the recovery of a claim shall be sustainable in any court of law or equity, unless the insured shall have fully complied with all of the requirements of this Policy, nor unless commenced within twelve (12) months next after the happening becomes known to the Insured, unless a longer period of time is provided by applicable statute.
>
> New York law provides for six years within which to initiate a legal proceeding (CPLR 213(2)). As Flat Ridge 2 understands the policy, this six-year limit, rather than the policy's 12-month limit, is the controlling limit, given that the policy expressly states that its 12-month period does not apply when "a longer period of time is provided by applicable statute." Please confirm that Underwriters agree and that, therefore, the applicable period does not expire before February 17, 2019. Absent such confirmation, Flat Ridge 2 will need to pursue its legal remedies without continuing to await the meeting to discuss resolution.

On February 5, 2014, Mr. Munoz wrote that Underwriters would welcome dates for a meeting, but first wanted to re-examine the property.

On February 6, 2014, Mr. Pasich and Mr. Munoz participated in a telephone conference. Mr. Munoz said that Underwriters could meet with Flat Ridge 2 on February 25, 2014. However, he said that he was not sure that they could re-examine the property before then and that he was worried that a meeting without completion of the re-examination "would not be productive." Mr. Pasich said that Flat Ridge 2 did not want to delay the meeting further when Mr. Munoz had not raised the re-examination until two weeks earlier, and said that there had been "too much delay." Mr. Munoz said, "I understand." Mr. Pasich also raised the question of the period within which any legal action would need to be commenced. Mr. Munoz said that he did not know the period under New York law. Mr. Pasich said that Flat Ridge 2 wanted to make sure that Underwriters agreed that the applicable period was six years. Mr. Munoz said, "We agreed to talk. We will not try to hide behind a statute of limitations." Mr. Pasich said that Flat Ridge 2 appreciated that, but requested confirmation because otherwise the parties would be looking at a suit date within the next 10 days, and Flat Ridge 2 "preferred not to have to file suit if the parties were serious about talking." Mr. Munoz said, "I will come back to you tomorrow or Monday [February 10, 2014] with a confirmation or a tolling agreement."

Mr. Munoz responded in a letter sent on Monday, February 10, 2014, first saying that Underwriters remained "ready to consider additional information that might be obtained in an effort to address and resolved [Flat Ridge 2's] continuing requests for reimbursement." He said that GCube "not only considers this good business, but desires to foster a continuing, mutually beneficial relationship" with Flat Ridge 2. He then said that GCube was prepared to "effect additional inspections" and that if there were evidence of damage, then GCube "stands ready to discuss and attempt to reach a mutually satisfactory resolution of [Flat Ridge 2's] requests for reimbursements." Mr. Munoz also stated that GCube "is prepared to consider further payment"

to Flat Ridge 2, requesting detailed inspections of hubs, drive trains, and blades. However, Mr. Munoz also asserted that the policy's one-year limitations period applied. Specifically, Mr. Munoz stated:

> Underwriters wish to make it clear that we have not retracted our partial denial as first set out in correspondence on 18 February 2013 and we do not do so now. While we agree New York law applies, we believe the Policy's agreed 12 month limitation rather than the 6 year general contract limitation is applicable Underwriters do not waive any of their rights or the Assured's contractual obligations under the Policy, including the Policy's Action Against Underwriters clause, or the time allowed for action therein, and we do not agree to extend the time for bringing action against Underwriters beyond that set out in the Policy. Nevertheless, we are willing to have the property at issue further inspected and/or tested as the experts require to determine if any actual damage to the components for which coverage was denied can be confirmed. Particularly, without waiving any of our contractual rights, we continue to wish to work with the Assured to arrive at a reasonable resolution of their claim for reimbursement.

Given Underwriters' new position, as stated in Mr. Munoz's February 10, 2014 letter, Flat Ridge 2 filed the instant suit on February 14, 2014, within 12 months of Underwriters' February 18, 2013, "partial denial."

On February 20, 2013, GCube reached out again to Flat Ridge 2. Its Claims Assistant stated, "Notwithstanding recent developments in New York, we are still keen to resolve this matter." He asked whether Flat Ridge 2 was "agreeable" to the proposals made in Mr. Munoz's February 10, 2014 letter. Two weeks later, Underwriters filed their motion to dismiss.

Discussion

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff's

claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

Underwriters' motion to dismiss Flat Ridge 2's breach of contract action on the grounds that it is untimely pursuant to the Policy's limitations period is denied. Underwriters have failed to demonstrate that the language of the contractual limitations clause found in the Policy utterly refutes Flat Ridge 2's factual allegations, conclusively establishing a defense as a matter of law.

To prevail upon their motion to dismiss, which is based solely on the argument that Flat Ridge 2's claim is time-barred by the language of the insurance policy, Underwriters must show that: (1) this lawsuit was not commenced until more than twelve months "after the happening" became known by Flat Ridge 2, and (2) there is no longer statutory period. Underwriters argue that the contractually agreed limitations period proscribed by the insurance policy is twelve months because no longer statutory period is *required* and that the action was not brought within twelve months "after the happening" became known to Flat Ridge 2 because the "happening" refers to the May 19, 2012 tornado/windstorm, which was immediately known to Flat Ridge 2 and Flat Ridge 2 did not commence the present action until February 14, 2014.

Flat Ridge 2 makes three arguments in response to Underwriters' asserted limitations defense: (1) that its claim is timely because the "happening" referred to in the limitations provision means Underwriters' denial of coverage, not the date the tornado struck the Wind Farm and, under New York law, limitations periods are to be computed from the time that the insured's claim accrues, which is the date of the denial; (2) that its claim is timely because the policy expressly recognizes that New York's six-year statute of limitations applies under the

circumstances, rather than the shorter contractually agreed upon one-year time period; and (3) that Underwriters are estopped from asserting a limitations defense because of their continued representations and actions made to resolve the disputed claim, both after the denial of coverage and after the time to bring suit had passed.

The interpretation of the "happening" language in the provision that Flat Ridge 2 espouses in its first argument is consistent with long-standing New York Law. As a result, Flat Ridge 2's action is timely since it filed less than 12 months after Underwriters denied its insurance claim and, thereby, Underwriters' motion to dismiss must be denied. Because Underwriters' motion is denied on the basis of Flat Ridge 2's first argument, the court need not address the merit of Flat Ridge 2's additional points in opposition of the motion at this time.

I. The limitations period stipulated in the Policy should be computed from the time that Flat Ridge 2's claim against Underwriters accrued, which is the date Underwriters denied coverage.

Flat Ridge 2's insurance policy states that an action cannot be filed against Underwriters "unless commenced within twelve (12) months next after the happening becomes known to the Insured." New York law has consistently distinguished between generic policy language, like that used above, which is read to set the limitations period to run from the date the insured's claim accrues, and more specific, precise language, which sets the period to run from the liability triggering event. *See e.g. Proc v Home Ins. Co.*, 17 NY2d 239 (1966); *Fabozzi v Lexington Ins. Co.*, 601 F3d 88, 92 (2d Cir. 2010); *Myers v Cigna Prop. & Cas. Ins. Co.*, F Supp 551, 555-56 (SDNY 1997) (holding that where the policy provision does not refer to the "inception" or "event" of the loss or damage, the limitations period will commence after the claim becomes "due and payable as opposed to the date of the loss or damage to the insured property"). In *Steen v Niagara Fire Ins. Co.*, 89 NY 315, 322-23 (1882), the first New York case to address the issue,

the court held that the generic language, "next after the loss or damage shall occur" should be construed to mean that the limitations period does not begin to run until "the right to bring an action exists" rather than when the loss "in fact occurs." The default rule in dealing with these contractual provisions then, is that, "[t]he time within which an action must be commenced . . . shall be computed from the time the cause of action accrued," *Cont'l Cas. Co. v Stronghold Ins. Co.*, 866 F Supp 143, 146 (SDNY 1994), *aff'd*, 77 F3d 16 (2d Cir. 1996) *citing* N. Y. Civ. Prac. L. & R. 203 (a), unless the parties agree that the date of loss or damage shall be looked to as the "happening" that starts the clock and they express this intention through clear and precise language. In *Fabozzi*, the Second Circuit concluded that only a limitations provision that uses the term of art "after the inception of the loss" or similarly precise language, "can tie a limitations period to the date of the accident or peril insured against." *Fabozzi*, 601 F3d at 93.

Although the exact language used in the provision in Flat Ridge 2's policy was not construed by any of these New York courts, a leading insurance treatise quoted in *Fabozzi* addresses the phrase "after the happening of the loss," stating that, "language such as 'after the happening of the loss' is considered to be 'lacking in precision' such that the limitations period is computed not from the time of the occurrence of the physical loss . . . but from the time that liability accrues." 601 F3d at 93 (quoting 71 NY Jur. 2d Insurance § 2528 (2010)). Here, the provision at issue, stating only "after the happening becomes known[...]" is similarly lacking in precision, as it does not employ any of the exacting language that would be sufficient to tie the limitations period to the occurrence of the loss or damage itself. For example, it does not make reference to "the physical damage out of which the claim arose," a particular type of damage-causing occurrence itself, or even to "the loss." *See Parker v American Sur. Co. of New York,* 176 Misc 985, 986-87 (Sup. Ct. N.Y. County 1941) (providing examples of the specificity that is

required for a court to specially construe the provision as being tied to the "destructive event" rather than giving it the standard construction that the limitations period begins to run when the insured's cause of action on the policy accrues). Since the language of the limitations provision here is vague and generic, it should be computed from the time that Flat Ridge 2's claim against Underwriters accrued – the date upon which Underwriter denied coverage – not from the date of the windstorm. *See Fabozzi*, 601 F3d at 93.

Despite this long-standing principle of New York law, Underwriters cite two cases that they believe support their position that the phrase "the happening" here actually refers to the occurrence of the damage or loss and therefore that the limitations period began to run on May 19, 2012 – the date of the tornado. The first case Underwriters rely on is *Franco Apparel Group, Inc. v National Liability & Fire Insurance Co.*, 481 F. App'x 694 (2d Cir. 2012). This case, however, is distinguishable because the language of the provision construed there is materially different from that found in Flat Ridge 2's policy. *Franco*, 481 F. App'x 694. In *Franco*, the provision at issue similarly used the language "the happening," but also quite distinctively employed additional, more specific language not found here: "within one year from the date of the happening *of the loss out of which said claim arose.*" *Id.* at 695 (emphasis added). This additional language, found to be equally as precise as a phrase such as "the inception of the loss," was the court's basis for finding that the provision in that policy was intended to commence the limitations period from the date of the "accident or peril insured against" rather than the date the insurance claim was denied. *Id.* Because such precise, exacting language or any language tying "the happening" to the physical loss or damage itself is not present in the provision at issue here, the result in *Franco* is not controlling.

Furthermore, Underwriters' reliance on *Bargaintown D.C., Inc. v Bellefonte Ins. Co.*, 78 AD2d 206 (1st Dept 1980) is also misguided. While the language used in the limitations provision in *Bargaintown* is identical to that used here, the contested issue of interpretation here: whether the limitations period was meant to begin to run at the date of the damage or at the date the claim accrued, was not being decided there. As a result, the court did not discuss the question in depth and merely assumed, for the sake of argument, and without citing any relevant precedent, that the discovery of the damage was the relevant "happening" against which to measure the limitations period. *Bargaintown*, 78 AD2d at 207. Certainly one passing assumption in a case that does not even address the issue of construction of limitations clauses in depth should not be read to reverse the settled rule of construction established by numerous controlling New York courts.

Since New York law provides that the generically worded limitations provision in Flat Ridge 2's policy should be interpreted to commence the limitations period at the time the claim accrued, it is essential for the resolution of this matter to determine when exactly Flat Ridge 2's claim accrued. As noted above, New York law operates under the settled principle that, for limitations purposes, "a claim generally accrues only once the conditions precedent to filing suit have been satisfied." *Fabozzi*, 601 F3d at 93. *See also Steen*, 89 N.Y. at 323; *Med. Facilities, Inc. v Pryke*, 62 NY2d 716, 717 (1984) ("[I]n the absence of any provision regarding accrual in the contract of insurance the Statute of Limitations for breach of contract generally begins to run upon breach."). These conditions are usually satisfied "when payment on any claim becomes due and enforceable." *Fabozzi*, 601 F3d at 93. Therefore, here, Flat Ridge 2's claim accrued when Underwriters denied coverage for the claim at issue, thereby allegedly breaching the insurance agreement. Underwriters communicated their partial denial to Flat Ridge 2 on

February 18, 2013, stating, for the first time, that there was "no coverage for this claim." Flat Ridge 2 filed the instant lawsuit on February 14, 2014. Flat Ridge 2 properly filed the action less than twelve months after the "happening": the denial of coverage and thereby accrual of the cause of action against Underwriters.

Conclusion

Flat Ridge 2's claim is timely and Underwriters' motion to dismiss on its contractual limitations argument is denied.

Accordingly, it is

ORDERED that defendant's motion to dismiss is denied.

Dated: June 30, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER