Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. v Trumbull Ins. Co.
2016 NY Slip Op 32736(U)
April 5, 2016
Supreme Court, New York County
Docket Number: 652633/2013
Judge: Jeffrey K. Oing

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. PART 48
Justice

Index Number : 652633/2013
BORAH, GOLDSTEIN,
vs.
TRUMBULL INSURANCE COMPANY
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Mtn is decided in accordance w/ the accompanying memorandum decision/order of this court.

Scanned to New York EF on 4/5/16

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

Dated: 4/5/16

JEFFREY K. OING, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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BORAH, GOLDSTEIN, ALTSCHULER, NAHINS & GOIDEL, P.C.,

Plaintiff,

-against-

TRUMBULL INSURANCE COMPANY a/k/a THE HARTFORD and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

----------x

Index No.: 652633/2013

Mtn Seq. No. 001

DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Sought

Plaintiff, Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. ("plaintiff" or "Borah Goldstein"), moves for partial summary judgment for declaratory relief and liability on its first, second, third, fourth, sixth, seventh, and eighth causes of action against defendant insurer Trumbull Insurance Company a/k/a The Hartford ("Trumbull")[1], and on its fifth cause of

[1]The causes of action against Trumbull: 1) declaratory relief under the Special Property Coverage Form, Section Q, entitled "Civil Authority" of the policy; 2) declaratory relief for Trumbull's failure to reserve its rights under the policy and requiring it to pay for damages sustained by plaintiff during plaintiff's business interruption from Friday, October 26, 2012 through the morning of November 5, 2012; 3) breach of contract for failing to indemnify plaintiff for its covered business interruption losses; 4) breach of implied covenant of good faith and fair dealing; 6) declaratory relief that Trumbull is obligated under its computer policy to reimburse plaintiff for its losses arising from the computer virus; 7) declaratory relief that as a direct and proximate result of Trumbull's breach of its computer policy plaintiff sustained monetary damages; and 8) breach of implied covenant of good faith and fair dealing.

action against defendant Consolidated Edison Company of New York, Inc. ("Con Ed")[2].

Defendant Trumbull cross-moves for summary judgment dismissing plaintiff's claims against it.

Defendant Con Ed cross-moves for summary judgment dismissing the fifth cause of action asserted against it for gross negligence.

Background

Plaintiff Borah Goldstein is a professional corporation engaged in providing legal services to its clients in the New York City metropolitan area. Plaintiff employs approximately 43 attorneys, most of whom are engaged in courtroom activity throughout the five boroughs of New York City on a daily basis, and approximately 80 non-attorneys engaged in back-office support. Plaintiff's offices are located on the fourth, fifth, sixth, and seventh floors (the "premises") at 377 Broadway in Manhattan (the "building" or "377 Broadway"). The premises are part of a commercial condominium, and ownership of the four floors comprising the premises include a 34.61% interest in the common elements of the building.

On October 26, 2012, the tri-State area prepared for the impact of a major storm -- Tropical Storm Sandy ("Sandy"). In

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[2]The single cause of action against Con Ed is a claim for gross negligence.

that regard, New York State Governor Andrew M. Cuomo declared a State of Emergency in New York in preparation for Sandy's impact, which was forecast to hit New York in the coming days. The declaration included the suspension of all train service in and out of New York City, including subway service. In addition, bridges, tunnels, and roadways were closed. Plaintiff contends that the Governor's declaration provided for the orderly shut down of bridges, tunnels, subways, buses, vehicular traffic,, and railroads due to high winds.

Mayor Michael R. Bloomberg of the City of New York issued a mandatory evacuation order for all people in Zone A, which plaintiff claims includes the immediate area of 377 Broadway (Moving Papers, Ex. J). Plaintiff claims that Mayor Bloomberg indicated that residents should stay home, that conditions were dangerous because of high winds, and that public transportation was completely shut down (Id.). Further, the Manhattan Borough President, Scott M. Stringer, issued a public letter advising all residents to stay at home and indoors to allow rescue workers to do their job (Moving Papers, Ex. K). Lastly, the Administrative Judges of the Courts of the City of New York shut down the Court system thus, plaintiff maintains, eliminating the ability of its attorneys to appear in the Courts and provide their professional services.

On October 29, 2012, Sandy made landfall. Plaintiff claims that the Governor's and the Mayor's declarations restricted access to the building for 72 hours commencing Monday, October 29, 2012, and court closures prevented plaintiff from resuming its business operations through Sunday, November 4, 2012. In addition, Con Ed anticipated a shut down of power and residents were directed to remain at home to allow emergency responders to act (Moving Papers, Ex. I).

Plaintiff claims that Con Ed's electricity service to its premises and building was lost on October 29, 2012 at approximately 8:30 p.m. Plaintiff asserts that the loss of electrical power to its premises and building, and hundreds of other Con Ed customers in lower Manhattan, was the result of an explosion at Con Ed's East 13th Street Transmission Substation (the "East 13th Street Substation") (Moving Papers, Ex. M, Moreland Commission Report, June 22, 2013, § 7.5.1, p. 58). Plaintiff also refers to a Wall Street Journal article, dated October 30, 2012, to support its claim that the explosion was most likely caused by flying debris (Moving Papers, Ex. N).

Power to plaintiff's premises was not restored until early morning on November 3, 2012. Plaintiff claims that during the immediate aftermath of Sandy, from October 29 through November 4, 2012, Borah Goldstein's business operations were effectively brought to a halt by the loss of power affecting the premises and

most of lower Manhattan, and by the transportation and court closures ordered by the civil authorities. Borah Goldstein maintains that interruption of its business at the premises resulted from the direct physical loss or physical damage to "Power Supply Services" provided by Con Ed due to the explosion at the Con Ed facility (Altschuler Aff., 5/19/14, ¶ 31).

In addition to its claims related to Sandy, plaintiff suffered a computer virus attack known as "Zero-Day" which affected user workstations as well as the corporate domain controller and file server. Plaintiff suffered the computer virus from November 21, 2012 through January 16, 2013. The virus affected over 50% of plaintiff's attorneys and non-legal employees, and their ability to operate in a normal fashion.

Before the computer virus attack, plaintiff retained an independent computer vendor, MindShift f/k/a Invision ("MindShift"), to secure its computer operations at a monthly cost of $5,750 (Altschuler Aff., 5/19/14, ¶ 36). In order to address the Zero-Day virus, plaintiff's corporate network was quarantined from November 22, 2012 through November 29, 2012, during which time MindShift spent 90 man-hours to resolve and prevent recurrences of the virus. Thereafter, MindShift accumulated an additional 60 man-hours to get plaintiff's employees back to a normal work status.

Discussion

Plaintiff's Motion for Summary Judgment Against Con Ed and Con Ed's Cross-motion to Dismiss

In its fifth cause of action, plaintiff alleges that Con Ed was grossly negligent in failing to storm proof its infrastructure during the fourteen months between the time Hurricane Irene hit the New York metropolitan area in August 2011 and the time Sandy was forecast in October 2012. To support its claim, plaintiff relies on Food Pageant, Inc. v Consolidated Edison Co., Inc., 54 NY2d 167 [1981], and argues that Food Pageant is analogous to this action.

In Food Pageant, a jury returned a verdict finding Con Ed grossly negligent and liable for the plaintiff's damages. Plaintiff grocery food chain sustained damages during the 1977 New York City blackout that left approximately three million Con Ed customers in New York City and Westchester County without electrical power. The electrical outage was caused by two lighting strikes, occurring within eighteen minutes of each other.

Plaintiff argues that liability should be easily granted here because in Food Pageant it was a sudden and unpredictable weather event that was completely outside Con Ed's control that formed the basis for finding Con Ed's liability for gross negligence. Here, plaintiff claims that government and Con Ed documents establish that Con Ed had notice at least since

Hurricane Irene that it should protect against a weather event like Sandy, yet failed to heed the warnings. In support of this claim, plaintiff relies on several documents and reports including: the Moreland Commission on Utility Storm Preparation and Response, dated June 22, 2013 (the "Moreland Commission Report") (Moving Papers, Ex. M); Con Ed's Public Service Commission Report ("PSC report"), entitled "Report on Preparation and System Restoration Performance" for Sandy, dated January 11, 2013, and covering the time period from October 29 through November 12, 2012 (Moving Papers, Ex. R); Con Ed's "Post Sandy Enhancement Plan," dated June 20, 2013 (Moving Papers, Ex. S); and a print out from Con Ed's website where Con Ed provides a one-year Sandy update and announced "Con Edison Investing $1 Billion to Help Protect New Yorkers From Major Storms" (Moving Papers, Ex. T).

Plaintiff relies heavily on the Moreland Commission Report, supra. Specifically, it points to the following relevant portions:

> The Commission's investigation of Con Edison uncovered numerous problems with its performance during Sandy. Con Edison's preparation for and response to flooding was inadequate, and prolonged the duration that customers were out of power ... Given the problems replete in Con Edison's storm performance, the Commission believes that Con Edison must seriously re-evaluate its storm preparation and response and adopt swift and substantive improvements before the next storm hits the region.
>
> * * *

> During Hurricane Sandy, Con Edison did not adequately document the decision-making process for de-energizing Company-owned electrical equipment. Con Edison's Corporate Coastal Storm Plan ("CCSP") did not require the adequate documentation of real-time decision-making regarding the preemptive shutdown of Con Edison electrical equipment. The CCSP, however, contemplated the need to make real-time decisions with respect to the preemptive shutdown of specific Con Edison equipment, such as networks or substations. To inform this decision-making, Con Edison has water level sensing equipment at various critical, flood-prone locations. Con Edison also places human "spotters" at these locations to supervise and report on flooding conditions to the decision-makers at the various command and control centers.
>
> The Commission found that Con Edison does not maintain a real-time log of the information that it receives from the field. Further, Con Edison does not maintain a record of the decision-making process leading to a potential shutdown. As a result, there is no written record available after a storm event to evaluate the facts on the ground when decisions are made to preemptively shut down -- or not shut down -- a network, areas substation or a major transmission station (e.g., East 13th St.).

(Moving Papers, Ex. M, pp. 57, 60-61).

Plaintiff claims that Con Ed's failure to preemptively shut down the East 13th Street Substation led to the explosion at that substation and resulted in the loss of power to the lower half of Manhattan (see Moving Papers, Ex. R, p. 19). Further, the East 13th Street Substation was vulnerable to flooding, and Con Ed was aware of that vulnerability at least since Hurricane Irene hit New York in August 2011 (Id. at p. 20).

Plaintiff also refers to Con Ed's Post Sandy Enhancement Plan, and argues that certain observations made by Con Ed and

improvements made in the aftermath of Sandy should have been made before Sandy in the fourteen months since Hurricane Irene in August 2011. In that regard, plaintiff contends that Con Ed admitted that the East 13th Street Substation was vulnerable to flooding and Con Ed was aware of this vulnerability since Hurricane Irene (Moving Papers, Ex. S, p. 20, 23-24).

Based on the foregoing, plaintiff argues that: (i) Con Ed knew its vulnerabilities since at least August 2011; (ii) Con Ed had access to the data necessary to determine what it needed to do in order to protect its facilities against those vulnerabilities since 2011; and (iii) Con Ed demonstrated its ability to complete the work that would have protected those facilities against Sandy in less than twelve months (see e.g., Moving Papers, Ex. T).

While plaintiff's arguments are persuasive, for the reasons that follow, they fall short of compelling me to make a summary finding that Con Ed was grossly negligent in its Sandy preparations. Further, for the same reasons, plaintiff has failed to raise a factual issue as to whether Con Ed committed gross negligence in its Sandy preparation.

Gross negligence "is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing" (Lubell v Samson Moving & Storage, Inc., 307 AD2d 215 [1st Dept 2003] [internal quotation marks omitted]). The gross

negligence standard has a high threshold, and requires that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" (Maltese v Westinghouse Electric Corp., 89 NY2d 955 [1997] [internal quotation marks omitted]). While the question of gross negligence is ordinarily a matter to be determined by the trier of fact (Food Pageant, Inc. v Consolidated Edison Co., Inc., 54 NY2d 167 [1981]), when plaintiff's allegations amount to, at most, ordinary negligence, the gross negligence standard is not met and defendant is entitled to summary judgment dismissing the claim for gross negligence (Lubell v Samson Moving & Storage, Inc., 307 AD2d 215, supra).

In reliance on Food Pageant, Inc. v Consolidated Edison Co., Inc., 54 NY2d 167, supra, plaintiff argues that Con Ed was grossly negligent in its Sandy preparations, or, at a minimum, a factual issue exists. There, the Court of Appeals reiterated that gross negligence amounts to "the failure to exercise even slight care" (Id. at 172). Plaintiff's reliance on Food Pageant is misplaced.

The Food Pageant jury had to consider whether a single individual, employed by Con Ed, failed to obey proper procedures in place in the context of a claim for failure to supervise. It

ultimately found Con Ed grossly negligent in its supervision of its employee. Here, on the other hand, there is no claim based on Con Ed's failure to supervise any employee. Instead, the claim is based on the sufficiency and adequacy of Con Ed's Sandy preparation, particularly in view of its experience with Hurricane Irene a year earlier.

On the issue of the sufficiency and adequacy of Con Ed's Sandy preparation, the record demonstrates that plaintiff failed to either establish that Con Ed was grossly negligent, or raise a factual issue as to whether Con Ed was grossly negligent in its preparations. Indeed, plaintiff's claim of gross negligence mis-characterizes and completely ignores reports about Con Ed's preparation for Sandy. In that regard, Con Ed proffers the affidavit of John Isecke ("Isecke"), who was its Chief Engineer of the Equipment and Field Engineering Department in the Central Engineering Organization from October 1, 2002 to July 31, 2013. Isecke held this position during Sandy and its aftermath. As Con Ed's Chief Engineer, Isecke had responsibility for Con Ed's substation power equipment, including both transmission substations and area substations (Isecke Aff., ¶ 3).

Isecke first describes how power is distributed to its customers through substations (Isecke Aff., ¶ 5). "Transmission substations are fed from multiple sources and transmit electric power to other transmission substations or to area substations,

which directly supply the networks from which most customers are serviced" (Id.). Isecke asserts that 13 of the more than 20 networks located in Manhattan lost power during Sandy (Id. at ¶ 6). The Canal Network is the network where 377 Broadway is located and was one of the networks that lost power (Id.). The Canal Network's power supply is the Leonard Street No. 2 area substation ("Leonard Street"), and Leonard Street is supplied by the East River Transmission Substation (Id. at ¶ 7). The East River Transmission Substation is part of the East River Complex (Id.). The East River Complex also includes, among others, the East 13th Street Substation (Id.), the substation plaintiff refers to as the cause of 377 Broadway's loss of power. As explained by Isecke, however, 377 Broadway is powered by the East River Transmission Substation, and ultimately, the East River Complex.

In fact, Isecke further describes how power is distributed as follows:

> The East River Transmission Substation is supplied with power by multiple high-voltage feeder cables (hereinafter,"feeders"), including four from the East 13th Street Transmission Substation and an external feeder. The East 13th Street Transmission Substation supplies several area substations in Manhattan, but it does not supply any area substations that supply power to the Canal Network, [plaintiff's network].

(Isecke Aff., ¶ 8).

In his affidavit, Isecke describes in thorough detail the storm-proofing protections in place at the East River Complex

including "numerous permanent features designed to minimize the impact of storms and floods" and "waterproof barriers surrounding various facilities, including the East River Transmission Substation, and waterproof barriers enclosing other critical equipment" (Isecke Aff., ¶ 9). Further, following prior storm events, including Hurricane Irene, Con Ed fortified the East River Complex by, inter alia, installing additional pumps and portable generators to ensure the integrity of supply feeders within the East River Complex, as well as additional flood detectors to alert Con Ed staff of rising flood waters (Isecke Aff., ¶ 11). Con Ed also revised its Coastal Storm Plan in the aftermath of Hurricane Irene (Id.). In fact, Con Ed moved critical equipment at the East River Complex to higher elevations, and at a minimum height of 11.2 feet (Isecke Aff., ¶ 12). Isecke notes that prior to Sandy, the highest flood waters ever observed at the East River Complex was in 1950, when they reached 10.1 feet (Id.).

With respect to Sandy preparation, Isecke further provides:

> In the days leading up to Superstorm Sandy, the National Weather Service predicted associated storm tides of between 6 and 11 feet at the New York Harbor. The most dire forecasts, issued by the National Weather Service, predicted a maximum possible storm tide of 11.7 feet at the Battery in New York City. Based on that maximum possible forecast, the very highest that any floodwaters at the river adjacent to the East River Complex could possibly reach was 11.1 feet.
>
> In addition ... [Con Ed] reinforced and built up the protections at the East River Complex to guard against

> a storm surge of 13 feet. Con Edison placed sandbags on the outer walls of the Complex and elsewhere and deployed polyethylene berms known as "aqua dams" to protect critical equipment inside the Complex. Con Edison interconnected these berms around critical equipment and filled them with water to a height of four feet so that they would act as dams to contain and control floodwater.
>
> * * *
>
> Con Edison also evaluated whether a preemptive shutdown of facilities at the East River Complex was warranted by Superstorm Sandy. Con Edison determined that, in light of the predicted levels of flooding, shutting down the Complex in advance of the storm would not enhance the protections of Con Edison's or customers' equipment. In fact, Con Edison did not shut down any transmission substations in advance of Superstorm Sandy. Preemptive shutdown of a transmission substation in advance of a storm is not warranted and would have been highly unusual.
>
> Con Edison further evaluated whether any customer networks would benefit from preemptive shutdown. Preemptive shutdown of a network is generally only merited where customer and Con Edison equipment is likely to be submerged in saltwater, in which case deenergizing the equipment decreases the risk of fire or other electrical hazard. Con Edison determined to preemptively shut down only two networks in Manhattan: Bowling Green and Fulton. These networks faced unique risks based on the predicted storm surge and their proximity to the Battery; none of the networks serviced by the East River Complex faced the same risks.

(Isecke Aff., ¶¶ 13-17).

As for the events that occurred when Sandy hit New York City, Isecke provides the following:

> Superstorm Sandy hit New York City on the evening of October 29, 2012. The surge that accompanied the storm was observed at approximately 14.1 feet, exceeding the highest estimated storm surge by 2.4 feet. The surge exceeded that of Hurricane Irene by over 5 feet and the previous historical high by 4 feet.

> This storm surge resulted in observed floodwaters of 13.8 feet at the East River Complex. These floodwaters overwhelmed the protections in place at the Complex and began to cause feeders to trip. The first feeder tripped at 7:29 p.m., three more tripped at 7:49 p.m., and a fifth was tripped at 8:05 p.m. as floodwaters continued to inundate the Complex. None of these trips caused any customers to lose electric service.

(Isecke Aff., ¶¶ 19-23).

Regarding restoration of electric service, Isecke states that:

> [w]hile the substations needed to be pumped, dried, and cleaned, and various minor repairs and protective equipment replacements needed to be made, repair of the circuit involved in the arc fault was not required to restore service at the East River Complex. Whether or not the East River Complex had been preemptively shut down, it would have required the same pumping, drying, cleaning, and replacement process before being restored to operation.

(Isecke Aff., ¶ 26).

The record clearly demonstrates that Con Ed's Sandy preparations were extensive, and does not support a summary finding that Con Ed was grossly negligent in its preparations.

As for plaintiff's reference to the Moreland Commission Report and its finding that "Con Edison's preparation for and response to flooding was inadequate" and that "Con Edison did not adequately document the decision-making process for de-energizing Company-owned electrical equipment," these findings do not demonstrate that Con Ed was grossly negligent, or raise an issue of fact in that regard. Isecke provides that shutting down the East River Complex prior to the advance of Sandy would have

provided no additional protection in light of the predicted levels of flooding. Even if the East River Complex had been shut down prior to Sandy, the same process would have been followed for restoration of the Complex, and the Complex would not have been restored more quickly than it was (Isecke Aff., ¶ 26). In addition, the Canal Network (which provides power to plaintiff's building) did not face the same risks that warranted preemptive shutdown of other networks. Further, the Canal Network was reenergized in the same amount of time or less as other Manhattan networks that had been preemptively shut down (Isecke Aff., ¶¶ 17, 28).

Additionally, and more importantly, as I noted during oral argument, plaintiff failed to proffer an expert affidavit challenging Isecke's statements concerning the sufficiency and adequacy of Con Ed's post-Irene and pre-/post-Sandy preparations/power restoration:

> THE COURT: [W]hen you look at gross negligence, and I go back to the [Isecke] affidavit, his affidavit is telling me look, this is what we did. We never expected anything like this to happen, even in the face of Katrina and Irene ... Maybe we didn't do as much as we could, but whether or not it rises to gross negligence, again ... not having an affidavit, an expert affidavit from your side telling me otherwise, it's kind of hard for me to accept the belief that there is gross negligence here.
>
> * * *
>
> MR. ALTSCHULER: Judge, yes; First of all, after Sandy, Con Ed drafted a post-Sandy enhancement plan on June 20th, 2013.

THE COURT: We know you cannot use post-accident, or post-type of remedial measures to prove negligence because at the end of the day[3] -

MR. ALTSCHULER: But, Judge, it refers back to the 2007 FEMA report, and the 2010 SLOSH report, both of which said you should have levels of 14.1 and 13.8 feet in order to protect this infrastructure of the East River Complex.

THE COURT: Right.

MR. ALTSCHULER: They didn't do that. They knew that in 2007. They knew after Irene in 2011. They had 14 months to do things, which could have avoided this.

THE COURT: Right, and they made a decision, a business decision that they thought based on their own observation that going up to 13 feet would have been sufficient to take care of, or at least protect everything else. That's simple negligence. That's not gross negligence. That I think rises to the level of simple negligence. It's not like a total disregard. Again, an affidavit of an expert from your side saying, you know, this whole thing about 13 feet is ridiculous ... Everybody in the industry knew that, that 13 feet was no where going to be sufficient, and that any kid, a first year engineering student would have told Con Ed guys are you kidding me, 13 feet? Come on, that's like putting a finger in a hole. That's not going to work. You got to go up to at least sixteen feet, but I don't have that.

* * *

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[3]Plaintiff's attempts to use evidence of the measures Con Ed took after Sandy as a way to show that Con Ed's preparations were inadequate are unavailing. To begin, evidence of subsequent repairs is not admissible in a negligence action (Hualde v Otis Elevator Company, 235 AD2d 269 [1st Dept 1997]). In any event, the Isecke affidavit clearly demonstrates the measures Con Ed took to protect the East River Complex in anticipation of Sandy (Isecke Aff., ¶ 14). This fact plaintiff fails to rebut with expert testimony.

THE COURT: ... I don't have in this record here for summary judgment ... where you have an expert to tell me, you know what, forget it. They're toast, it's gross negligence. But, hang on a second. Your response.

* * *

MS. LUDMERER: Well, your Honor, I would simply state that as Plaintiff concedes in its papers, in order to show gross negligence, Plaintiff would have had to show the Defendant failed to exercise even slight care, and the standards in the cases from every Court of Appeals case --

THE COURT: It's pretty high.

MS. LUDMERER: It's very high. It requires --

* * *

MS. LUDMERER: ... Just so it's clear, in the Kulmage case -- these are old cases, but they're still law; Gross negligence differs in kind, not only degree, from ordinary negligence. It has to have been a reckless disregard for the rights of others. It has to convince, it has to involve potential wrongdoing.

THE COURT: I think, look, it's a decision, at the end of the day, that the engineers had to make, and it's a split second decision, a decision that's based on all that's going on. This is Mother Nature we're dealing with. I don't need to point any further than the catastrophic blizzard that we were supposed to have that thank goodness we didn't have, but at the end of the day, this is all very touchy feely. It's not an exact science. Whether or not you committed gross negligence, you know, the simple fact of the matter is, was there negligence? Maybe. But, was there gross negligence? That I'm sure I think is harder for me on this record to find at this point ....

MS. LUDMERER: Well, I just want to give some indication because it wasn't -- I know you said, your Honor, it's not an exact science.

* * *

MS. LUDMERER: I don't want there to be a suggestion that my client was guilty of negligence, much less gross negligence.

THE COURT: I said may. I used very careful words.

MS. LUDMERER: So, there's a lot of talk about what we didn't do after Hurricane Irene, and you can see what the different levels were. Con Edison did its best to turn this into an exact science, as best as it could, and so, there was -- these are the different levels that had been reached; a nine foot level in Hurricane Irene, and the equipment was protected to 11.1 and above, even without the extra measures that Con Ed took. The prior observed record in 1950, 10.1, and I only want to go back to 1821, that's 11.2.

THE COURT: That's the highest.

MS. LUDMERER: That's the highest. That's almost two hundred years almost, your Honor, so what we're saying is Con Ed committed gross negligence by failing to anticipate a level that was higher than two hundred years ago, and there is no way that this can constitute gross negligence. Con Edison takes it responsibilities seriously. It has a coastal storm plan with precautions that it took in light of what the forecasts were for the storm that was at hand, and it mobilized pursuant to a costal storm plan, which had been continually revised since Katrina, since Irene, since the 2003 Nor'easter. Con Edison put in all these extra features. I'm just talking about East River Complex now. I'm not talking about the rest. Waterproof barriers enclosing feeders, waterproof barriers enclosing transformers, other critical equipment, flood detectors. After Irene, it put in nitrogen pumps, and diesel generators to further protect the feeders, to protect the oil in the feeders, additional pumps and generators following Hurricane Irene, and they elevated in this period of years, not all of it, right after Hurricane Irene. They elevated the critical equipment to a minimum height of 11.2 feet. The highest prediction at the Battery was 11.7. That's at the Battery. It would be less that the East River Complex.

THE COURT: Right.

MS. LUDMERER: These are at [sic] additional preparations they took; protections against a storm surge of 13 feet, utilize sand bags in the complex, use the special aqua dams, so the precautions were extraordinary, and they have three of them, and this is the --

THE COURT: At the end of the day, it was a surge over a foot, over the 13 -- almost a foot.

MS. LUDMERER: Yes, it was.

THE COURT: It wasn't a surge of four or five feet. I mean, you missed it by a foot in a sense, not to say that that's a bad thing.

MS. LUDMERER: Your Honor, we think a foot is just a foot. You take a ruler. When it's a surging wave coming at you, a foot has much greater significance, and they actually agree with the precautions that we took. Those precautions are not in dispute, and in terms of the maximum forecasted storm surge for Sandy was eleven feet, okay, so Con Edison employed protective measures to protect against a surge of 13 feet. The actual storm surge exceeded the maximum predicted surge. And who are these experts giving us that? That is the organization NOAA. I love the name because Noah and the flood. NOAA is all caps. It includes the National Weather Service within it. It includes the National Hurricane Center within it. NOAA is making predictions in October, 2012. They're saying oh, don't pay attention to those predictions in 2012. Instead go back to 2010, and something that NOAA put in a SLOSH report relating to hurricanes. The SLOSH is also all caps. The H in SLOSH is for hurricanes. At this point, of course, the National Hurricane Center had already determined this was not a hurricane. It was a post-tropical storm, which was not expected to have the force of a hurricane, and that they're saying you know what, you need to rely on something from two years before, not on what we know as Sandy approaching.

(March 3, 2015 Tr., at pp. 47-54).

Plaintiff's failure to proffer an affidavit from an expert to challenge Con Ed's assertions is fatal to its arguments, and

precludes a finding that a factual issue exists concerning whether Con Ed was grossly negligent in its Sandy preparations. Further, this exchange, supra, demonstrates that Con Ed did not fail to "exercise slight care," and that on this record its Sandy preparation cannot be deemed to have been a conscious disregard and indifference to a known or obvious risk, particularly given the known and documented information it had at its disposal when devising the preparation for Sandy.

In sum, the measures Con Ed took after Hurricane Irene and leading up to Sandy, including the decision to not deenergize East River Complex, clearly demonstrate that Con Ed's conduct did not "evince[] a reckless disregard for the rights of others or smack[] of intentional wrongdoing" (Colnaghi U.S.A., Ltd. v Jewelers Protection Services, Ltd., 81 NY2d 821 [1993] [internal quotation marks omitted]).

Accordingly, that branch of plaintiff's motion for summary judgment against Con Ed on its fifth cause of action for gross negligence is denied, and Con Ed's cross-motion dismissing the complaint as asserted against it is granted, and the complaint is dismissed against it.

Plaintiff's Motion for Summary Judgment Against Trumbull and Trumbull's Cross-motion to Dismiss

Defendant Trumbull issued to plaintiff a Hartford Spectrum Business Insurance Policy (the "business policy"), effective July 15, 2012 to July 15, 2013, as well as a Hartford Computer and

Electronic Equipment Policy (the "computer policy"), effective July 15, 2012 to July 15, 2013 (Moving Papers, Exs. G and H). Plaintiff submitted claims to Trumbull for coverage under the business policy for business interruption as a result of Sandy, and under the computer policy for expenses incurred as a result of the Zero-Day virus.

The Business Policy

Plaintiff asserts claims under the business policy for business interruption pursuant to the Civil Authority, Business Income from Dependent Properties, and the Off-Premises Utility Services provisions of the business policy.

Plaintiff submitted its claim to Trumbull on November 7, 2012. Trumbull issued its first denial of coverage letter on February 1, 2013 denying the claim for loss of business income based on the Off-Premises Utility Services provision because the claim fell under the flood exclusion and was therefore not a covered cause of loss (Moving Papers, Ex. A, Verified Complaint, Ex. E). Thereafter, Trumbull issued another denial of coverage letter, dated March 1, 2013, denying coverage due to an order by a Civil Authority because plaintiff was not "specifically prohibited" from accessing its premises (Id., Ex. G). In addition, Trumbull claimed the state of emergency that was in place at the time of Sandy was flood-related, thus the flood exclusion applies (Id.). Trumbull issued another denial letter,

dated March 29, 2013, reiterating denial of the claims based on the fact that access to plaintiff's premises was not specifically excluded and based on the flood exclusion (Id., Ex. I). In addition, Trumbull denied plaintiff's claim because the business policy does not list the "Court System of the Boroughs of the City of New York" as a dependent property, nor does it meet the definition of a "Dependent Property" under Section "D. Definitions" of the endorsement (Id.).

The relevant portion of the Civil Authority provision of the business policy provides the following:

> q. Civil Authority
>
> (1) This insurance is extended to apply to the actual loss of Business Income you sustain when access to your "scheduled premises" is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your "scheduled premises".

The Business Income from Dependent Properties provision provides, in relevant part:

> s. Business Income from Dependent Properties
>
> (1) We will pay for the actual loss of Business Income you sustain due to direct physical loss or physical damage at the premises of a dependent property caused by or resulting from a Covered Cause of Loss.
>
> * * *
>
> (4) Dependent Property means property owned leased or operated by others whom you depend on to:

(a) Deliver materials or services to you or to others for your account ....;

(b) Accept your products or services;

(c) Manufacture your products for delivery to your customers under contract for sale; or

(d) Attract customers to your business premises.

The business policy's "Business Income Extension For Off-Premises Utility Services" provides the following, in relevant part:

A. Business Income Extension For Off-Premises Utility Services

This Coverage Extension applies only when the Business Income Additional Coverage is included in this policy.

We will pay for loss of Business Income or Extra Expense at the "scheduled premises" caused by the interruption of service to the "scheduled premises". The interruption must result from direct physical loss or physical damage by a Covered Cause of Loss to the following property not on "scheduled premises":

* * *

3. "Power Supply Services."

Lastly, the business policy contains the following relevant exclusion:

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damages is excluded regardless of any other cause or event that

> contributes concurrently or in any sequence to the loss:
>
> * * *
>
> (f) Water
>
> (1) Flood, including the accumulation of surface water, waves, tides, tidal waves, overflow of streams or any other bodies of water, or their spray, whether driven by wind or not.
>
> (2) Mudslide or mud flow.
>
> (3) Water that backs up from a sewer or drain; or
>
> (4) Water under the ground surface pressing on, or flowing or seeping through:
>
> (a) Foundations, walls, floors, or paved surfaces.
>
> (b) Basements, whether paved or not; or
>
> (c) Doors, windows or other openings.

Business Interruption -- Civil Authority and Dependent Properties

Plaintiff argues that the civil directives leading to the preemptive shut-down do not come within the purview of the business policy's flood exclusion because the directives were concerned primarily with high winds. Plaintiff also argues that the phrase "specifically prohibited" in the Civil Authority provision is not defined in the business policy, and therefore is subject to an interpretation consistent with the reasonable

expectations of the insured (Oppenheimer AMT-Free Municipals v ACA Financial Guaranty Corporation, 110 AD3d 280 [1st Dept 2013]). Thus, in the case of Sandy, adhering to the orders of the civil authorities "specifically prohibited" access to the scheduled premises because any reasonable person hearing the directives would not have accessed the premises.

In addition, plaintiff claims that because the courts in New York City were closed to civil cases until November 5, 2012, the "Business Income from Dependent Properties" provision of the business policy applies. Plaintiff argues that its attorneys regularly ply their trade in the courthouse and the courthouse is the location Borah Goldstein's business is dependent upon for its operation.

For the reasons that follow, that branch of plaintiff's motion for summary judgment based on the Civil Authority and the Dependent Properties provisions of the business policy is denied, and Trumbull's cross-motion to dismiss the claims based on these provisions is granted.

Contrary to plaintiff's contention that the evacuation order was due to high winds, the actual text of the order specifically provides other weather conditions, which are excluded from coverage:

> This State of Emergency has been declared because anticipated weather conditions are likely to cause heavy flooding, power outages, and disruption of public

> transportation and other vital services, and these conditions imperil the public safety.

(DeAngelis Affirm., Ex. 1 [emphasis added]).

Further, while the mandatory evacuation orders represent orders of a civil authority that specifically prohibited access to certain areas, they did not specifically prohibit access to plaintiff's premises. Here, the October 28, 2012 mandatory evacuation pertained to the residents who lived in New York City's evacuation Zone A (DeAngelis Affirm., Ex. 1). Contrary to plaintiff's claim, however, its premises are located in evacuation Zone C rather than Zone A. Thus, the evacuation order is not applicable to plaintiff's claim, and plaintiff's access to the "scheduled premises" was not "specifically prohibited by an order of a civil authority." Further, the state of emergency declared by Governor Cuomo and the evacuation order issued by Mayor Bloomberg did not prohibit access to plaintiff's premises, and plaintiff fails to point to any type of order specifically prohibiting it from its premises. Plaintiff's mere difficulty in accessing the premises is not sufficient to constitute a prohibition (see e.g. Royal Indemnity Company v Retail Brand Alliance, Inc. v Royal & Sun Alliance Insurance, PLC, 33 AD3d 392 [1st Dept 2006]; 54th Street Limited Partners, L.P. v Fidelity and Guaranty Insurance Company, 306 AD2d 67 [1st Dept 2003]). Thus, affording the civil authority provision its plain meaning, Oppenheimer AMT-Free Municipals v ACA Financial Guaranty

Corporation, 110 AD3d at 282, supra, plaintiff fails to show that "access to [its] 'scheduled premises' [was] specifically prohibited." In any event, plaintiff also fails to demonstrate that there was any "Covered Cause of Loss to property in the immediate area of [plaintiff's] 'scheduled premises'" as required under the provision at issue.

Plaintiff next argues that the courthouse closures fall within the purview of the "Business Income from Dependent Properties." That argument is unavailing. There is no evidence that the court closures were caused by "direct physical loss or physical damage" at the courthouses in Manhattan, or that the courthouse buildings fall within the business policy's definition of dependent property (see Special Property Coverage Form, §[s](1) and (4)[a]-[d], supra).

Business Interruption -- Off-Premises Utility Coverage

Plaintiff also claims that its business policy with Trumbull covers losses of business income sustained as a result of the interruption of off-premises utility service to the premises. In that regard, plaintiff argues that the cause of the loss should be traced only so far back as the Con Ed electrical arc event and outage, and not to any flooding which may have caused the electrical arch (see Home Insurance Company v American Insurance Company, 147 AD2d 353 [1st Dept 1989]). Plaintiff further argues tracing the proximate cause of the loss back to the electrical

arc makes sense given that the flood exclusion provision must be narrowly construed. The argument is unpersuasive.

The record is clear that the electrical arc was not the cause of the power outage in lower Manhattan.[4] Instead, according to Isecke's unchallenged, comprehensively detailed affidavit, the power loss at the Canal Street Network, which provides power to plaintiff's building, was the result of flooding associated with Sandy at Con Ed's East River Complex, supra. Isecke provides the following unrebutted commentary on the events that occurred when Sandy hit New York City:

> Superstorm Sandy hit New York City on the evening of October 29, 2012. The surge that accompanied the storm was observed at approximately 14.1 feet, exceeding the highest estimated storm surge by 2.4 feet. The surge exceeded that of Hurricane Irene by over 5 feet and the previous historical high by 4 feet.
>
> This storm surge resulted in observed floodwaters of 13.8 feet at the East River Complex. These floodwaters overwhelmed the protections in place at the Complex and began to cause feeders to trip. The first feeder tripped at 7:29 p.m., three more tripped at 7:49 p.m., and a fifth was tripped at 8:05 p.m. as floodwaters continued to inundate the Complex. None of these trips caused any customers to lose electric service. At 8:12 p.m., some low-voltage auxiliary equipment at the East 13th Street Transmission Substation became submerged in saltwater from the flooding. That exposure to saltwater caused a dramatic arcing fault at electrical conductors adjacent to a circuit breaker cubicle, which created a visible, prolonged, and bright flash that certain sources in the immediate aftermath

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[4]Con Ed's January 11, 2013 report to the Public Service Commission detailed how flooding caused damage to its equipment which, in turn, resulted in the power outage in Manhattan (DeAngelis Affirm., Ex. 6).

> of the storm misidentified as an explosion. No feeders to or from the East River Transmission Substation were affected by the arc fault. Neither the East River Transmission Substation nor the East 13th Street Transmission Substation shut down as a result of the arc fault. No customer lost electric service as a result of the arc fault.
>
> As flooding continued, the first feeder between the East 13th Street Transmission Substation and the East River Transmission Substation was tripped at 8:23 p.m., and another was tripped a minute later at 8:24 p.m. The flooding continued quickly, and at 8:26 p.m. all feeders to the East River Transmission Substation had been tripped, and the substation shut down, which also caused the shutdown of Leonard Street. Electric service to the Canal Network, and thus to 377 Broadway, was accordingly disrupted at 8:26 p.m. This service disruption was wholly unrelated to the arc fault.
>
> The East 13th Street Transmission Substation, the substation at which the arc fault had occurred, continued operating after the East River Transmission Substation shut down. The East 13th Street Transmission Substation did not itself shut down until 8:38 p.m., when the last of its supply feeders had tripped due to flooding.

(Isecke Aff., ¶¶ 19-23).

These unrebutted statements demonstrate that the explosion-like dramatic arcing fault at the East 13th Street Substation did not cause plaintiff's loss of power because plaintiff's power source emanated from the East River Transmission Substation. Further, the record demonstrates that Con Ed's failure to shut down the East 13th Street Substation did not proximately cause plaintiff's loss of power because that substation did not, in fact, service 377 Broadway.

In any event, plaintiff fails to point to any evidence that its loss of power was not caused "directly or indirectly" by water as found in the exclusion. Nor can it, given the above-noted undisputed facts. As such, the loss is "excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

Based on the foregoing, because the power loss in the area where plaintiff's building is located was the result of a flood, and not the electrical arc, the business policy's flood exclusion applies, and coverage is excluded.

Accordingly, that branch of plaintiff's motion for summary judgment based on its claims for business interruption due to Sandy is denied.

That branch of Trumbull's cross-motion for summary judgment dismissing plaintiff's claims based on business interruption from Sandy is granted, and the first, third, and fourth causes of action are dismissed.

In the second cause of action, plaintiff seeks declaratory relief against Trumbull for Trumbull's failure to reserve its rights under the business policy. Plaintiff claims that it filed its claim on November 7, 2012, and Trumbull did not deny coverage until February 1, 2013.

The second cause of action is also dismissed. This record clearly indicates that Trumbull was in regular contact with

plaintiff, and ultimately issued three declination letters in a timely fashion.

The Computer Policy

Borah Goldstein's business interruption insurance policy with Trumbull also covers losses of business income sustained as a result of a computer virus. The Computer and Electronic Equipment Coverage Form provides, in relevant part:

> A. Coverage
>
> We will pay for direct physical "loss" to Covered Property caused by any of the Covered Causes of Loss.
>
> 1. Covered Property, as used in this Coverage Form, means the following property while located at the premises listed in the Schedule:
>
> a. Computer Equipment
>
> Computer Equipment, including related component parts and peripheral equipment such as printers and modems typically used with computers;
>
> * * *
>
> d. "Media and Data"
>
> A Limit of Insurance of $25,000 is included for your "media and data" at each scheduled location. You may purchase additional coverage. If you do, the most we will pay is $25,000 plus the limit scheduled;
>
> * * *
>
> 2. Additional Coverage for Computer and Electronic Equipment Business Income Loss

The following coverage applies to your "loss" of "Business Income" caused by direct physical loss to property covered under this policy caused by a Covered Cause of Loss. This coverage applies only after any other valid and collectible "Business Income" or business interruption coverage has been exhausted. This other available coverage may be applicable either in whole, or in part, to the "loss" covered by this policy.

a. We will pay for the actual loss of "Business Income" you sustain due to the necessary total or partial suspension of your data processing operations during "period of restoration". The suspension must be caused by direct physical "loss" to Covered Property caused by a Covered Cause of Loss.

* * *

c. In the event of loss of "Business Income" you must resume all or part of your data processing operations as quickly as possible. We will reduce the amount we will pay for your "Business Income" to the extent you can resume your business in whole or in part, by using damaged or undamaged property at the listed premises or elsewhere.

d. Limit of Insurance

The most we will pay for loss of "Business Income" in any one occurrence is $25,000 plus the Limit of Insurance, if any, shown in the Schedule applicable to Business Income.

3. "Extra Expense" and Expediting Expense

a. We will extend this insurance to pay any "Extra Expense" you incur following a Covered Cause of Loss to:

(1) Continue your normal data processing operations, or avoid or minimize the suspension of such operations;

(2) Research, restore or replace the lost information on damaged valuable papers and records, to the extent that such expenses reduce the amount of "loss" that would otherwise have been payable under this coverage form.

(3) Extract "computer virus";

* * *

7. Coverage Extensions

a. "Computer Virus" Coverage

We will extend this insurance to pay for "loss" caused by "computer virus". The amount payable under this coverage extension is included within the Limits Of Insurance.

(Moving Papers, Ex. H).

According to the denial letter, Trumbull provided the following explanation for denying coverage:

> You stated that a virus caused damage to your computer system and resulted in a loss of business. You advised that the initial virus was on 11/21/12 and it took approximately eight weeks before the systems were fully operational. You also advised that MindShift Technologies is on a monthly retainer contract to service and repair the computers. As this is a service contract and an already incurred expense we are unable to extend coverage for this portion of the loss. We also sent the loss of income documentation over to the accountant for review and there was no loss of revenue for the period of restoration.

(Moving Papers, Ex. A, Verified Complaint, Ex. K).

Plaintiff argues that section 2 of the computer policy allows Borah Goldstein to recover its business interruption damages resulting from the computer virus, and not just the cost to remediate the virus's effects. Further, section 3 of the computer policy expressly provides that Borah Goldstein may recover its virus remediation costs. Because Borah Goldstein arranged a service contract in advance to remediate, such contingency does not mean it should shoulder the cost while Trumbull receives the benefit after such virus attack occurs.

Trumbull claims that pursuant to the terms and conditions of the computer policy, the most that plaintiff would be able to recover for business income losses related to the Zero Day virus would be $25,000. Trumbull contends that while plaintiff submitted documents purporting to show that it suffered a business income loss as a result of the computer virus, it was unable to provide support for the expenses associated with the removal of the virus. These expenses were part of its maintenance contract with MindShift that was in place prior to the date of loss.

In addition, Trumbull claims that its analysis of plaintiff's business income loss conducted by a forensic accountant determined that plaintiff did not suffer a loss of revenue as a result of the virus (DeAngelis Affirm., Ex. 11). In that regard, plaintiff's monthly average revenue, calculated by

using the September 2012 and October 2012 period preceding the virus, was $1,292,802, and attorney billing for the same period was $1,085,328. Plaintiff's monthly revenue and billings exceeded the monthly average every month from December 2012 through April 2013. Thus, Trumbull claims, plaintiff cannot demonstrate that it suffered a business loss under the computer policy.

That branch of plaintiff's motion and Trumbull's cross-motion based on the computer policy claims are denied. Trumbull partly denied the claim based on the fact that plaintiff already had a monthly retainer contract with MindShift in place when the loss occurred. Trumbull, however, fails to address section 3 of the computer policy, which provides for coverage for mitigating the effects of the virus and for extracting the virus. Trumbull does not dispute that this provision applies to the contract services plaintiff received from MindShift to rectify the virus.

In addition, as plaintiff points out, the document Trumbull proffers from its forensic accountant (DeAngelis Affirm., Ex. 11) to demonstrate that plaintiff did not suffer a business income loss under the computer policy, is an unsigned, half-page spreadsheet that is unaccompanied by an affidavit or any credentials of the forensic accountant who prepared it. Thus, the issue of whether Borah Goldstein sustained any damages remains unresolved.

Lastly, in light of the foregoing, that branch of Borah Goldstein's motion for summary judgment on its eighth cause of action for breach of the implied covenant of good faith and fair dealing based on computer policy is denied.

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that defendant Trumbull's cross-motion for summary judgment is granted to the extent of dismissing the first, second, third, and fourth causes of action, and denied as to the sixth, seventh and eighth causes of action; and it is further

ORDERED that defendant Con Ed's cross-motion for summary judgment dismissing the fifth cause of action asserted against it is granted; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 48 (60 Centre Street, Room 242) on April 19, 2016, at 10:00 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 4/5/16

HON. JEFFREY K. OING, J.S.C.