STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

DOWNSTAIRS CABARET, INC.,

Plaintiff

-vs- Index No. E2018000858

WESCO INSURANCE COMPANY,

Defendant

Special Term
October 25, 2018

APPEARANCES

WOODS OVIATT GILMAN, LLP
Andrew J. Ryan, Esq.
Attorneys for Plaintiff

MOUND COTTON WOLLAN & GREENGRASS LLP
Kevin F. Buckley, Esq.
Attorneys for Defendant

DECISION

Rosenbaum, J.

Defendant, Wesco Insurance Company, moves for an order pursuant to CPLR 3212 granting partial summary judgment against Plaintiff and dismissing the business interruption claim.

On March 11, 2015, boiler plumbing pipes at the Downstairs Cabaret Theater's ("DCT") property, located at 540 East Main Street, Rochester, New York, burst and caused extensive damage to the property. DCT alleges that it consequently ceased operations for no less than two years.

DCT submitted a claim to Wesco for losses incurred, including building repairs/ reconstruction, asbestos removal, moving/ storage of contents, business interruption and loss of building contents. Wesco initially denied that the policy covered business interruption loss, but it is alleged that it subsequently acknowledged that the policy does provide that coverage. It is alleged that Wesco has advanced some funds but has not adequately reimbursed and indemnified DCT for the full loss.

The parties spent two years trying to resolve the coverage loss issues under the policy. DCT contends that as a result of these disputes, DCT's business has been interrupted for no less than two years and alleges that the loss included DCT's inability to produce and host multiple successful theatrical productions.

DCT alleges that it complied with all conditions precedent to coverage and cooperated with Wesco and its agents.

DCT's Complaint was filed on April 4, 2018 and alleges breach of contract, seeking damages no less than $1,000,000. Wesco answered on April 25, 2018 and stated several affirmative defenses, including failure to state a

cause of action, failure to comply with the conditions of the Policy, and that coverage is unavailable for loss of business income where a limit of insurance is not shown in the Declarations.

A party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). "Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Id. See also, Qlisanr, LLC v. Hollis Park Manor Nursing Home, Inc., 51 A.D.3d 651, 652 (2d Dept. 2008). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 N.Y.2d at 324 , *citing* Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

Wesco argues that DCT is not entitled to recover for business income loss for the suspension of operations during the period of restoration because at the time of the loss, DCT did not have coverage for such damage.

The Policy at issue defined Business Income Loss as follows:

> **A. Coverage**
>
> 1. **Business Income**
>
> Business Income means the:
> a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
>
> b. Continuing normal operating expenses incurred, including payroll.

Policy, at Business Income (and Extra Expense) Coverage Form, at 1. This Coverage further states:

> We will pay for the actual loss of the Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

Id.

"'The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent.'" Camuso v. Brooklyn Portfolio, LLC, 164 A.D.3d 739, 741 (2nd Dept. 2018), *quoting* Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002). "'The best evidence of what parties to a written agreement intend is what they say in their writing.'" Id., *quoting* Slamow v. Del Col, 79 N.Y.2d 1016, 1018 (1992). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Id.

> A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing (see, e.g., Mercury Bay Boating Club v. San Diego Yacht Club, 76 N.Y.2d 256, 269-270, 557 N.Y.S.2d 851, 557 N.E.2d 87; Judnick Realty Corp. v. 32 W. 32nd St. Corp., 61 N.Y.2d 819, 822, 473 N.Y.S.2d 954, 462 N.E.2d 131; Long Is. R.R. Co. v. Northville Indus. Corp., 41 N.Y.2d 455, 393 N.Y.S.2d 925, 362 N.E.2d 558; Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 365, 239 N.Y.S.2d 865, 190 N.E.2d 230). That rule imparts "stability to commercial transactions by safeguarding

> against fraudulent claims, perjury, death of witnesses * * * infirmity of memory * * * [and] the fear that the jury will improperly evaluate the extrinsic evidence." (Fisch, New York Evidence § 42, at 22 [2d ed].) Such considerations are all the more compelling . . . where commercial certainty is a paramount concern.

W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

"Extrinsic evidence 'may not be considered when the intent of the parties can be gleaned from the face of the instrument.'" Lehman Bros. Intl. (Europe) v. AG Fin. Prods. , Inc., 60 Misc.3d 1214(A) (Sup.Ct. N.Y. Co. 2018), *quoting* Chimart Assocs. v. Paul, 66 N.Y.2d 570, 572-73 (1986). "[A] contract should be 'read as a whole; . . . and if possible it will be so interpreted as to give effect to its general purpose.'" Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 324-25 (2007), *quoting* Matter of Westmoreland Coal Co. v. Entech, Inc., 100 N.Y.2d 352, 358 (2003). "Whether or not a writing is ambiguous is a question of law to be resolved by the courts." W.W.W. Assoc., 77 N.Y.2d at 162. "Ambiguity exists when, looking within the four corners of the documents, terms are reasonably susceptible of more than one interpretation." AMCC Corp. v. New York City Sch. Constr. Auth., 154 A.D.3d 673, 676 (2nd Dept. 2017). A contract, including an insurance policy, "should be read to give effect to all of its provisions, so as not to render any portion superfluous." Sozzi v. Moishe's Moving Sys., Inc., 16 Misc.3d 1121(A) (Sup.Ct. N.Y. Co. 2007).

The tenets of contract interpretation are applied "with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople." Ashwood Capital, Inc. v. OTG Mgt., Inc., 99 A.D.3d 1, 7 (1st Dept. 2012). "In such cases, 'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.'" Id., *quoting* Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004). See also, Camperlino v. Bargabos, 96 A.D.3d 1582, 1583 (4th Dept 2012).

"An insurance agreement is subject to principles of contract interpretation." Universal Am. Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 25 N.Y.3d 675, 680 (2015). "'[T]he test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy and employing common speech.'" Id., *quoting* Matter of Mostow v. State Farm Inc. Cos., 88 N.Y.2d 321, 326-27 (1996). "[W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so 'in clear and unmistakable' language." Seaboard Sur. Co. v. Gillette CO., 64 N.Y.2d 304, 311 (1984), *quoting* Kratzenstein v. Western Assur. Co., 116 N.Y. 54, 59 (1889). "Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction." Seaboard, 64 N.Y.2d at 311. "[B]efore an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case . . . and that they are subject to no other reasonable interpretation." Id. (citations omitted).

Wesco contends that the Policy at issue unambiguously does not provide coverage for business interruption loss unless a limit of insurance is shown in the Declarations:

> We will pay for the actual loss of the Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

Policy, at Business Income (and Extra Expense) Coverage Form, at 1. Wesco states that the Declarations do not list a Business Income limit of Insurance, which is a prerequisite for this coverage to apply. Wesco argues that the lack of any limit in the Declarations for Business Income is evidence that this type of coverage was not contemplated by the parties. According to Wesco, the Policy's language does not require Wesco to indemnify DCT for its business income losses, pointing in particular to the statement that there must be a limit of insurance contained in the Declarations when this type of coverage applies.

DCT opposes this motion for partial summary judgment on two grounds, ambiguity in the Policy and estoppel. DCT contends that Wesco relies on a single ambiguous sentence within the voluminous policy, while ignoring multiple communications and representations made by Wesco to the contrary.

DCT notes that this insurance policy "contains provisions which are ambiguous and therefore must be construed against the insurer, the drafter of the document." Custom Weld Indus. v. Chabina Co., 272 A.D.2d 364, 365 (2nd Dept. 2000). Ambiguities in an insurance policy require looking to "extrinsic evidence to determine the intent of the parties." Show Car Speed Shop v. United States Fid. & Guar. Co., 192 A.D.2d 1063, 1064 (4th Dept. 1993).

Here, DCT states that the Policy is ambiguous and thus the Court must look to extrinsic evidence to determine the parties' intent. First, DCT states there is an ambiguity because the policy lists "Business Income (and Extra Expense)" coverage on a list of endorsements in the declaration portion, and the Declarations provides a $2 million limit in the general aggregate and a $1 million limit for each occurrence. Based on that, DCT states that it believed it was covered for Business Income loss. As noted *supra*, the Business Income endorsement states that Wesco will pay for actual loss of Business Income, but then appears to require a limited premises and a limit of insurance. DCT's premises are listed in the Declarations with a policy limit. Second, the Business

Income Endorsement under Section B entitled "Limits of Insurance" states:

> The most we will pay for loss in any one occurrence is the applicable Limit of Insurance shown in the Declarations.

This section does not mention "Business Income Limit of Insurance," but rather references the "Limit of Insurance showing the Declarations." The Declaration lists the "Limits of Insurance."

If the Court were to accept Wesco's interpretation, DCT contends that the last half sentence of the endorsement clause would render the entire endorsement for Business Income Loss inapplicable and meaningless. The question would then arise as to why this endorsement exists at all, and ignore that the covered premises are described in the Declarations and that a policy limit is included.

Wesco's motion for summary judgment is denied because the Policy is ambiguous, thus creating a question of fact that prevents summary judgment being awarded. The Business Income endorsement, at Section B entitled "Limits of Insurance," states that "the most we will pay for loss of any one occurrence is the applicable *Limit of Insurance* shown in the Declarations." This contrasts with the provision relied upon by Wesco, Section A.1 of the Business Income endorsements, claiming that coverage does not apply unless a "Business Income Limit of Insurance is shown in the Declarations." The Declaration of the Policy recites under "Limits of Insurance," a "General Aggregate Limit" ($2 million) and an "Each Occurrence Limit" ($1 million). DCT reads the Policy to mean that the limits of insurance are the limits listed on the Declarations page.

Moreover, the Policy Declarations also contains a page entitled "Commercial Property Declarations", which states:

> COVERAGES PROVIDED:
>
> Refer to attached schedule, if any.

The attached schedule is entitled "COMMERCIAL PACKAGE POLICY FORMS AND ENDORSEMENTS SCHEDULE" and stated therein is the "Business Income (and Extra Expense Coverage" form.

DCT also argues that Wesco's motion should be denied because Wesco is estopped from claiming that Business Income insurance does not apply after assuring DCT for 33 months that it did apply. DCT's counsel stated that he communicated with Wesco's Legal and Compliance Counsel with respect to coverage in this matter and was assured at all times that DCT had Business Income coverage. Throughout the time the parties sought to resolve the coverage, DCT contends that Wesco gave DCT every indication that it had Business Loss coverage, and even offered to settle the claim.

Equitable estoppel requires that a party establish:

> '(1) Conduct which amounts to a false representation or concealment of material facts. . . which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive of the real facts.'

Brelsford v. USAA, 289 A.D.2d 847, 849 (3rd Dept. 2001), *quoting* Michaels v. Travelers Indem. Co., 257 A.D.2d 828, 829 (3rd Dept. 1999). The elements of a claim for estoppel are:

> '(1) (l)ack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estoppel; and (3) action based thereon of such a character as to change his position prejudicially.'

Id.

DCT contends that it purchased the policy with the intent to obtain Business Income Interruption coverage, that "Business Income and Extra Expense" coverage is included in a list of endorsements, and the Declarations

page states a $2 million limit in the general aggregate and $1 million for each occurrence. Based on the forgoing, DCT contends that it believed it was covered for Business Income loss. Moreover, after the date of loss, DCT made a claim and it is alleged that Wesco stated several times that coverage would apply. Thus, DCT believed that Wesco had confirmed the coverage and the only issue left was to determine the amount of the business income loss. DCT states that the issue of coverage only arose where the parties were unable to agree on the amount of business income loss. DCT argues that Wesco represented for 33 months that business income coverage applied and never disclaimed coverage during that time, causing DCT to rely on that representation in its business decisions to DCT's detriment.

On the issue of estoppel, DCT also raises a question of fact to prevent granting summary judgment. The Court notes in particular the email communication sent from Wesco's Legal and Compliance Counsel to DCT:

> 4. **Business Income Coverage**
> We acknowledge that you have business income coverage (on an actual loss sustained basis) and that business income indemnification will be based on the determination of the loss that you sustained due to the pipe freeze.

Affidavit of Christopher F. Kawolsky, Exhibit C. Likewise, an adjuster from North Coast Claims, the company retained by Wesco, stated: "AmTrust NA has determined that they will provide coverage for Business Income on an actual loss sustained basis." Affidavit of Richard R. Smith, Exhibit A. Indeed, the AmTrust accountant ultimately determined that it would be reasonable to put aside $400,000 on reserve for the business interruption portion of the claim. Id. at ¶10. DCT states that it relied upon the representations that it had Business Income coverage. DCT states that if it had known Wesco was going to disclaim Business Income coverage, it would have taken alternative actions in utilizing available funds, planning for future events at the business, and would

have sought other means of recovery for the loss.

For the reasons stated *supra*, Wesco's motion for summary judgment is denied.

Signed at Rochester, New York this 13th day of February, 2019.

Matthew A. Rosenbaum
Supreme Court Justice