New York Botanical Garden v Allied World Assur.
2021 NY Slip Op 32402(U)
October 15, 2021
Supreme Court, Bronx County
Docket Number: Index No. 0803872/2021E
Judge: Eddie J. McShan
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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NEW YORK BOTANICAL GARDEN

-against-

ALLIED WORLD ASSURANCE

----------X

Index №. 0803872/2021

Hon. Eddie J. McShan,

Justice.

The following papers numbered 1 to _____ Read on this motion,
Noticed on and duly submitted as No. _____ on the Motion Calendar of ____

	PAPERS NUMBERED	
Notice of Motion, Order to show Cause- Exhibits and Affidavits Annexed		1
Answering Affidavits and Exhibits		
Replying Affidavit and Exhibit		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

This Notice of Motion submitted by Defendant seeking an order of dimissal is decided in accordance with the annexed Decision and Order signed simultaneously with this Order.

This shall constitute the decision and order of the Court.

Dated: October 15, 2021

Hon. Eddie J. McShan, J.S.C.

1. CHECK ONE ..... ❑ CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE

2. MOTION IS ..... ❑ GRANTED X DENIED ❑ GRANTED IN PART ❑ OTHER

3. CHECK IF APPROPRIATE ❑ SETTLE ORDER ❑ SUBMIT ORDER ☒ SCHEDULE APPEARANCE

❑ FIDUCIARY APPOINTMENT ❑ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-32

NEW YORK BOTANICAL GARDEN,

Plaintiff,

-against-

ALLIED WORLD ASSURANCE COMPANY (U.S.) INC.,

Defendant.

DECISION AND ORDER

Index No.: 803872/2021E

Present:
HON. EDDIE J. MCSHAN

The following e-filed documents, listed on NYSCEF as document numbers 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 (Motion Seq. #002) were read on this motion seeking an order of dismissal.

Upon the foregoing cited papers, the Decision and Order of this Motion is as follows:

Defendant moves to dismiss Plaintiff's complaint in its entirety pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff opposes Defendant's applications for an order of dismissal. Defendants' application to dismiss Plaintiff's complaint based upon documentary evidence is denied. Defendants' applications to dismiss Plaintiff's complaint for failure to state a cause is denied as follows.

Background

Plaintiff purchased Blanket Pollution Legal Liability Policy No. 0310-2297 ("Policy") from the Defendant effective July 1, 2019 until July 1, 2020. Endorsement No: 15 of the Policy provides for business interruption and contingent business interruption coverage. As a result of various executive orders issues by the Governor of the State of New York and the Mayor of the City of New York, Plaintiff was required to cease operation of its not-for-profit business.[1]

[1]NYS Executive Order 202.5 closed all places of public amusement, whether indoors or outdoors, effective at 8:00 p.m. on March 19, 2020. In addition, New York City Emergency Order 102 required all places of public amusement to remain close effective March 20, 2020.

Plaintiff was also required to reduce its in-person workforce by 100% no later than March 22, 2020.[2]

Plaintiff commenced this proceeding after Defendant denied coverage of its claim seeking losses it sustained as a result of the executive orders. Plaintiff seeks a declaration that Defendant is required to provide business interruption coverage as a result of its losses due to the various executive orders. Plaintiff also seeks damages for Defendant's alleged breach of the Policy, and breach of the implied covenant of good faith and fair dealing.

Defendant argues that Plaintiff cannot meet its burden of establishing coverage under the subject Policy. Defendant suggests that the executive orders did not completely deny Plaintiff access to its premises. Defendant asserts that a complete denial of access is required under the Policy and New York State law. Defendant insists that the executive orders only closed Plaintiff's business to the public and reduced its workforce. Defendant suggests that Plaintiff cannot establish that all of its employees were denied access to its premises. Defendant insists that only the public and Plaintiff's non-essential employees were denied access.

Defendant next argues that Plaintiff cannot establish that the executive orders were "Solely and Directly" the result of a "Pollution Incident" at a specific "Independent Location." Defendant acknowledges that "COVID-19 constitutes a 'pollution condition' as defined in the Policy," but insists that the executive orders were issued for "prophylactic reasons" in an effort to mitigate the spread of the virus. Defendant asserts that the "Executive Orders were not issued solely and directly to address the presence of COVID-19 at any non-NYBG [Plaintiff] location, but rather were issued broadly 'to limit the risk of spreading the COVID-19 virus." Defendant insists that COVID-19 is everywhere and not at one specific independent location that effected Plaintiff's property as required by the Policy.

Plaintiff argues that it has plead all of the necessary elements necessary to establish that it is entitled to coverage under the Policy. Plaintiff asserts that it purchased a "broader Blanket

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[2]See NYS Executive Order Number 202.8.

Pollution Legal Liability policy that is triggered by a "pollution incident" such as COVID-19. Plaintiff suggests that Defendant relies on caselaw interpreting policies that are substantially different from its Policy and notes that those policies were civil authority policies that required "direct physical loss or damage to property to trigger coverage" which is not required under its current Policy. Plaintiff insists that its broader pollution liability policy is not a typical civil authority policy that requires the physical loss or damage to property, and the specificity-of-location requirements.

Plaintiff asserts that the plain language of its Policy suggests that a complete denial of access to the property was not required. Plaintiff argues that there are four provisions of the Policy that contradict Defendant's suggestion that a complete denial is required. Plaintiff suggests that the language ending the "Business interruption period" allows it access to the property on a temporary basis. Plaintiff insists that such language permits it to access its location during the business interruption period as long as such access is temporary. Plaintiff also notes that the Policy contemplates a reduction of "business interruption costs" "to the extent that the insured can resume operations, in whole or in part, at the location by or lease to you, or by making use of other locations." Plaintiff insists that the common sense meaning of this section allows it access to the property to resume operation as long as a triggering event terminating the business interruption period is not triggered.

Plaintiff next suggests that the fact the maximum potential period of time to recovered business interruption costs under the Policy is significantly longer than the civil authority policies Defendant relied upon "contemplates a potentially long-term period of contingent business interruption . . ." Plaintiff argues that consideration of the nature of its business is essential when interpreting the Policy. Plaintiff insists that it would be "absurd" if the Policy required a denial of complete access to the property to trigger coverage because it would be unable to take care of any of the plants that remained onsite. Plaintiff insists that the coverage under its Policy is triggered by a suspension of operation and not by an order prohibiting access as asserted by Defendant.

Plaintiff insists that a complete denial of access is unreasonable when reading the Policy as a whole.

Plaintiff further argues that the Policy it purchased does not require it to establish damage to its property or that the pollution incident occurred at a specific independent location in close proximity. Plaintiff asserts that such requirements are standard language civil authority policy for commercial properties and emphasizes that such language does not exist in its pollution Policy. Plaintiff insists that the Policy is triggered by a pollution incident such as the COVID-19 Virus. Plaintiff notes that the Policy has a broad definition for independent location and asserts that the Court must read the Policy as a whole.

Dismissal Based Upon Documentary Evidence

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez,* 84 NY2d 83 [1994] *citing Morone v Morone,* 50 NY2d 481 [1980]; *Rovello v Orofino Realty Co., Inc.,* 40 NY2d 633 [1976]). The court must accept facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon,* 84 NY2d 83). Moreover, "[a] motion pursuant to CPLR 3211(a)(1) may be granted 'only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (*see Furman v Wells Fargo Home Mtge., Inc.,* 105 AD3d 807 [2d Dept 2013] *citing Goshen v Mutual Life Ins. Co. of New York,* 98 NY2d 314 [2002]).

Caselaw has determined that a document relied upon by the moving party seeking dismissal pursuant to CPLR 3211(a)(1) will qualify as documentary evidence if it is unambiguous and of undisputed authenticity (*Anderson v Armentano,* 139 AD3d 769 [2d Dept 2016]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence' in the proper case" (*Anderson,* 139 AD3d 769).

Initially, the Court finds that the subject Policy constitutes documentary evidence that falls squarely within the ambit of CPLR 3211(a)(1) as it is a document reflecting the parties' undeniable out-of-court transaction for insurance coverage. The relevant provisions of the Policy, even if the parties allege different interpretations, do not require the Court to disregard the policy as ambiguous (*see for example Westchester Fire Insurance Co. v Schorsch*, 186 AD3d 132 [1st Dept 2020]). The Court is guided by a reasonable reading of the plain language of the policy and reads it to avoid ambiguities (*Westchester Fire Insurance Co.*, 186 AD3d 132). Moreover, the Policy is of undisputed authenticity as both parties rely on it to make their respective arguments (*Anderson,* 139 AD3d 769). The Court also finds that the various executive orders issued by the Governor and the Mayor of the City of New York relied upon by the parties are documentary evidence as they are also unambiguous and of undisputed authenticity.

Generally, "[t]he purpose of business interruption insurance is to indemnify the insured against losses arising from inability to continue normal business operation and functions due to the damage sustained as a result of the hazard insured against" (*Howard Stores Corp. v Foremost Ins. Co.*, 82 AD2d 398 [1st Dept 1981]). Endorsement No: 15 provides important definitions and limitations of coverage relied upon by both parties. Endorsement No: 15 provides two distinct definitions and limitations for "Business Interruption and Contingent Business Interruption" coverage. The Business Interruption Coverage provides that:

> We will pay **business interruption costs resulting from business interruption caused solely and directly by a pollution incident** on, at or under a location owned by, or leased to you provided that:
>
> a. The **pollution incident** takes place in the **coverage territory;**
> b. The **pollution incident** is first discovered during the policy period; and
> c. You report the **business interruption** to us, in writing during the **policy period.**

Defendant acknowledges that COVID-19 is a "pollution incident" as defined by the Policy. Endorsement No: 15 goes on to define "business interruption" as "the necessary suspension of your operation at a location owned by or leased to you, provided that such suspension of your

operations first commenced during the **policy period** and is caused solely and directly by a **pollution incident** on, at or under a **location** owned by or leased to you; . . ."

The critical issue created by the parties' different interpretations of the Policy is whether the definitions and language contained within Endorsement No: 15 utterly refutes Plaintiff's allegations that it is entitled to coverage as a result of its business being interrupted by the various executive orders issued by the government in an effort to contain the spread of COVID-19 . The essence of the dispute is Plaintiff's entitlement to coverage under the "Contingent business interruption" definition within the Policy which provides that:

> **Contingent business interruption** means the necessary suspension of your operations at a location owned by or leased to you as a result of an order by a government body or authority denying access to the location owned by or leased to you, provided that:
>
> a. Such suspension first commenced during the **policy period** and is caused solely and directly by a **pollution incident** on, at or under an **independent location**;
>
> b. Such order is solely and directly the result of a **pollution incident** at the **independent location**; and
>
> c. An **insured** is not legally liable for such **pollution incident**.
>
> **Independent location** means a **location** that is not and was not at any time a **location** owned, leased, managed, operated or used by an insured.

It is well settled that "'[i]n determining a dispute over insurance coverage, [courts] first look to the language of the policy'" (*In re Viking Pump, Inc.*, 27 NY3d 244). "When construing insurance policies, the language of the 'contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured'" (*In re Viking Pump, Inc.*, 27 NY3d 244). This Court is required to "construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*In re Viking Pump, Inc.* at 257). This Court's review of the Endorsement No: 15 finds that the parties' inclusion of the Contingent Business Interruption

coverage along with the Business Interruption coverage provides significantly different and expanded coverage than the typical civil authority coverage Defendant's relies on to make a comparison. Plaintiff correctly notes that its Policy does not contain a civil authority provision nor the more restrictive language of a civil authority policy for commercial properties.

Endorsement No.: 15 specifically defines the "Business interruption period" to include temporary access to the Plaintiff's premises. The Policy unambiguously states that:

> **Business interruption period** means the period of time that begins the number of hours shown as Business Interruption "Waiting Period" in Item 3. of the Declarations after the time and date that the business interruption first commenced, and ends at the time and on the date that is the earlier of:
>
> a. The time and date that the insured resumes normal business operations at the location owned by or leased to you or at another location;
>
> b. The time and date the **insured**, acting reasonably and with due diligence, should have resumed normal business operations at the location owned by or leased to you at another location;
>
> c. The time and date that is three hundred sixty five (365) days after the time and date that the **business interruption** first commenced: and
>
> d. With respect to **business interruption costs** resulting from **contingent business interruption** only, the date and time the insured is allowed access to the location owned by or leased to you on an other-than-temporary basis.

The Court notes that subparagraph d of the Business interruption period definition is specific and exclusive to the coverage provided by the contingent business interruption coverage triggered by COVID-19 and the executive orders. The plain and common meaning of subparagraph d unambiguously allowed Plaintiff temporary access to its premises during the applicable period. Any other interpretation of the Policy would render subparagraph d without force and effect (*In re Viking Pump, Inc.*, 27 NY3d 1144).

In addition, the Policy's unambiguous definition of "business interruption costs" similarly requires an interpretation that a denial of complete access to Plaintiff's premises is not required. The Policy provides that:

> **Business interruption costs** mean actual loss of business income and extra expense you incur during the **business interruption period. Business interruption costs** will be reduced to the extent that the insured can resume operations, in whole or in part, at the location owned by or leased to you, or by making use of other locations. **Business interruption costs** shall not include any amounts that do not directly result from a covered **pollution incident**.

The Court finds that the plain and common language in the Policy reducing the amount the insured can recover "to the extent that the insured can resume operation, in whole or in part," clearly creates an expectation that the insured may resume operations, even in part, in order to mitigate the damages. Accordingly, this Court's interpretation of the Policy as a whole finds that a complete denial of access to the Plaintiff's property is not required to trigger contingent business interruption coverage. Plaintiff's temporary access to its premises in an effort to take care of the plants was expected under the Policy in an effort to mitigate the damages.

The Court also finds that the documentary evidence relied upon by the Defendant does not utterly refute Plaintiff's allegations that the suspension of its business was caused "solely and directly" by COVID-19 at an independent location. This Court's review of Endorsement No: 15 finds no language creating a radius clause for the location of the "independent location" nor any suggestion that physical damage to Plaintiff's property is required. Instead, the Policy provides a broad definition of an "independent location" to include "a location that is not and was not at any time a location owned, leased, managed, operated or used by an insured." Moreover, there is no language at all requiring physical damage to Plaintiff's property. The Court may not provide a more restrictive reading of the unambiguous language of Endorsement No.: 15 to make it analogous to the civil authority policies Defendant relies on.

Based upon the Court's findings, Defendant's application for an order of dismissal based upon documentary evidence is denied. The plain and unambiguous language of the Policy does

not utterly refute Plaintiff's allegations in its Complaint that it is entitled to a declaration that its losses are covered by the Policy and that Defendant failed to comply with the Policy.

Dismissal Based Upon A Failure to State a Cause of Action

Generally, in determining a motion under CPLR 3211(a)(7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'" (*Leon,* 84 NY2d 83 *citing Guggenheimer v Ginzburg,* 43 NY2d 268 [1977]). Plaintiff's Third Cause of Action seeks an award of consequential damages for Defendant's alleged breach of the implied covenant of good faith and fair dealing. "The implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct" (*see Gutierrez v Government Employees Insurance Company*, 136 AD3d 975 [2d Dept 2016]).

The Court finds that Plaintiff has sufficiently plead a distinct cause of action regarding Defendant's alleged breach of the implied covenant of good faith and fair dealing. After accepting Plaintiff's allegations as true and affording Plaintiff the benefit of every possible inference, Plaintiff's allegation that Defendant "failed to perform a timely, fair, and complete investigation and determination of NYBG's claim . . . and by failing to give proper individualized consideration to NYBG's claim" fit withing the cognizable legal theory of breach of the implied covenant of good faith and fair dealing. If true, Plaintiff's insistence that Defendant's failure to perform a reasonable investigation of its claim "is part of a broader business practice to deny policyholders' business interruption coverage claims for losses relating to coronavirus and COVID-19" suggests that Defendant is engaging in conduct that is destroying or injuring Plaintiff's right to receive the fruit of the Policy (*Gutierrez*, 136 AD3d 975).

In addition, it is well settled that "[a]n insurance carrier has a duty to 'investigate in good faith and pay covered claims'" (*Gutierrez* at 976). "Damages for breach of that duty include both the value of the claim, and consequential damages, which may exceed the limits of the policy, for failure to pay the claim within a reasonable time" (*Gutierrez* at 976-977). Plaintiff's demand for consequential damages includes a request for prejudgment interest and attorney fees which are not covered by the Policy and made possible as a result of Plaintiff having commenced this action. The Court finds that Plaintiff's claim for Defendant's alleged breach of the implied covenant of good faith and fair dealing is not duplicative of its breach of contract claim. Accordingly, Defendant's application to dismiss Plaintiff's Third Cause of Action for failure to state a cause of action is denied.

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED that Defendants' application seeking an order of dismissal based upon documentary evidence is denied in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that the Defendant's application seeking an order of Dismissal of Plaintiff's Third Cause of Action for failure to state a cause of action is denied in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that the parties shall appear for a preliminary conference in this matter on December 9, 2021 at 11:30 a.m. All parties must contact the Court at either (718) 618-1326 or eshkreli@nycourts.gov to obtain the link to the virtual appearance; and it is further

The foregoing shall constitute the decision and order of this Court.

Dated: October 15, 2021

J.S.C.