

Joseph Gliksman CPA, P.C. v Kookmin Best Ins. Co., Ltd.

2022 NY Slip Op 30129(U)

January 14, 2022

Supreme Court, Kings County

Docket Number: Index No. 500783/2017

Judge: Wayne P. Saitta

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 14th day of January , 2022.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

-----X

JOSEPH GLIKSMAN CPA, P.C.,

Plaintiff,

Index No. 500783/2017

-against-

KOOKMIN BEST INSURANCE CO., LTD. (US Branch) formerly known as LEADING INSURANCE GROUP INSURANCE CO., LTD.,

DECISION AND ORDER MS #2

Defendants,

-----X

The following papers numbered on this motion:

NYSCEF Doc Numbers

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	62-63, 80-81
Answering Affidavit (Affirmation) _____	83, 92
Reply Affidavit (Affirmation) _____	94
Supplemental Affidavit (Affirmation) _____	
Pleadings – Exhibits _____	64-79, 85-91, 93
Stipulations – Minutes _____	
Filed Papers _____	

This action involves a breach of contract claim to recover insurance proceeds for damages that it sustained to its Premises as the result of rainwater. Defendant issued Plaintiff a Businessowners Policy, effective from April 13, 2014 to April 15, 2015 for Plaintiff’s office located at 5417 18th Avenue, Brooklyn, NY (the Premises). The Policy provided coverage for Plaintiff’s business personal property located at the Premises.

Plaintiff alleges that on January 18, 2015, wind caused debris to fall on and break a skylight that allowed rain to penetrate the Premises and cause damage to Plaintiff's business personal property. Plaintiff claims that the damage prevented use of the office causing an interruption to its business.

Defendant disclaimed coverage for both the physical damage to Plaintiff's property and its business interruption claim. Plaintiff claims that the damage falls within the confines of the Policy and that Defendant improperly denied coverage for the loss.

Defendant moves for an Order, pursuant to CPLR § 3212, dismissing Plaintiff's complaint.

Claim for Property Damage

Defendants claim that the Policy excludes coverage for this particular loss. Defendants argue that the rain infiltrated the roof as a result of a pre-existing defect and therefore triggers the application of the interior damage limitation.

Defendant points to the Policy's interior damage limitation which provides in relevant part:

4. Limitations

a. We will not pay for loss or damage to:

(5) The interior of any building or structure caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:

(a) The building or structure first sustains damage by
a covered cause of loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters; or

(b) The loss or damage is caused by or results from the thawing of snow, sleet or ice on the building or structure.

In support of their motion, Defendants submit reports and Affirmations from their independent adjuster, William G. Steele, and their engineering consultant, Alan E. Fidellow, P.E. These experts opine that there was no evidence that a projectile carried by the wind broke the skylight above Plaintiff's Premises causing rainwater to enter through the resulting hole. They cite weather reports of January 18, 2015 which indicated that there was rainfall of 2.1 inches and winds of 4 mph with gust up to 20 mph and concluded that the wind was insufficient to cause damage to the skylight. Instead, they opine that the rainwater damage occurred when the roof's flashing failed.

In opposition, Plaintiff argues that while the damage was discovered on January 18th, a Sunday, he had not been in the office since Friday the 16th and submitted weather reports showing that there had been gusts of wind up to 45 mph on the 16th.

Plaintiff submits its testimony and an Affidavit, along with an invoice from its contractor, Israel Oppenheim. Plaintiff testified that the skylight had been broken which allowed the water to enter the Premises and that Mr. Oppenheim had to remove the broken skylight and board up the hole to mitigate the continued water intrusion.

“[I]n determining a motion for summary judgment, the court's function is limited to the ascertainment of the existence of any genuine issues of material fact in the proofs laid bare by the parties' submissions of affidavits based on personal knowledge and documentary evidence, rather than in their conclusory or speculative averments” (*Behar v. Ordover*, 92 AD2d 557, 558, [2d Dept 1983]). “If material facts are in dispute or if different inferences may reasonably be drawn from facts themselves undisputed, a motion for summary judgment must be denied” (*Supan v. Michelfeld*, 97 AD2d 755, 756

[2d Dept 1983]). “It is well settled that issues of credibility are to be determined by the trier of facts . . .” (*D’Amico v. Allstate Ins. Co.*, 194 AD2d 761, 761 [2d Dept 1993]).

Here, Plaintiff’s testimony and Affidavit is sufficient to raise a question of fact in light of Defendants experts. It is up to the trier of fact as to Plaintiff’s persuasiveness.

Business Interruption Claim

Defendants also claim that Plaintiff is not entitled to business income coverage because Plaintiff never ceased operations. Defendant points to the Policy’s business income coverage which provides in relevant part:

4. Additional Coverages

f. Business Income

(1) Business Income

(a) We will pay for the actual loss of 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 of or damage to property at the described premises. 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 the site at which the described premises are located. With respect to the requirements set forth in the preceding paragraph, if you occupy only part of the site at which the described premises are located, your premises means:

- (i) The portion of the building which you rent, lease or occupy; and
- (ii) Any area within the building or on the site at which the described premises are located, if that area services, or is used to gain access to, the described premises.

- (b) We will only pay for loss of Business Income that you sustain during the "period of restoration" and that occurs within 12 consecutive months after the date of direct physical loss or damage. We will only pay for ordinary payroll expenses for 60 days following the date of direct physical loss or damage, unless a greater number of days is shown in the Declarations.

Defendant argues that Mr. Gliksman continued working as an accountant during the four months that he was outside the Premises. Defendant submits Mr. Gliksman's deposition where he testifies that during the two to four months the Premises was closed, he went to see his clients rather than having them come to his office; that he conducted business on the phone and through email; and that he went to the office to pick up checks that were delivered in the mail.

In opposition, Plaintiff submits its Affidavit stating that the business sustained a loss of income that was calculated in a spreadsheet which was also submitted. Plaintiff argues that it was attempting to mitigate its business interruption damage by attempting to conduct business from outside the Premises, but that this does not impugn the business interruption claim.

"[I]n order for business interruption insurance to be triggered, there must be a "necessary suspension," i.e., a total interruption or cessation" of operations (*Broad Street, LLC v. Gulf Ins. Co.*, 37 AD3d 126, 131 [1st Dept 2006], quoting *54th St. Ltd. Partners v. Fidelity & Guar. Ins. Co.*, 306 AD2d 67, 67 [1st Sept 2003]).

Here, Plaintiff's own testimony demonstrates that there was not a total interruption or cessation of its operations as the business continued to conduct operations outside the Premises during the two to four months repairs were being made.

WHEREFORE, it is ORDERED that Defendant's motion is granted to the extent of dismissing only that part of Plaintiff's complaint based on its claim for business interruption coverage, and is denied as to that part of the complaint based on Plaintiff's claim for physical damage to its office and property.

This constitutes the decision and order of the Court.

ENTER,



J.S.C.