

**Mill Basin Bridge Constructors, LLC v Markel Am.  
Ins. Co.**

2022 NY Slip Op 31773(U)

June 3, 2022

Supreme Court, New York County

Docket Number: Index No. 451679/2020

Judge: Arlene Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE BLUTH PART 14**

*Justice*

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MILL BASIN BRIDGE CONSTRUCTORS, LLC

Plaintiff,

- v -

MARKEL AMERICAN INSURANCE COMPANY,

Defendant.

-----X

**INDEX NO.** 451679/2020

**MOTION DATE** 06/01/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for SUMMARY JUDGMENT.

The motion by defendant for summary judgment dismissing the complaint is granted.

**Background**

Plaintiff was hired as the general contractor for the reconstruction of the Mill Basin Bridge in Brooklyn. On August 26, 2016, plaintiff leased a deck barge in order to transport materials for the project. Plaintiff alleges that when the materials for the project were finally delivered (in April 2018), the project was on hold because the existing bridge piers had to be demolished before the reconstruction could be completed. Therefore, the barge was moored to fender piles surrounding the new bridge and plaintiff contends it was a stationary material storage platform.

The materials remained on the barge until October 12, 2018 when a fire broke out on the barge and destroyed all of the materials stored on it. Apparently, the exhaust of a gasoline fuel pump caused a wood railing on the edge of the barge to ignite. Plaintiff submitted a claim to

defendant, an insurance company with whom it had previously acquired an insurance policy. Defendant denied the claim on the ground that the materials were waterborne and therefore subject to an exclusion in the insurance policy.

Plaintiff brought this case for declaratory relief and breach of contract arising out of defendant's denial of its claim. It insists that defendant should have provided coverage and seeks recovery for the damaged materials (which amounts to over \$1 million).

Defendant moves for summary judgment on the ground that its denial of coverage was proper under the terms of the policy. It insists that the property was "waterborne" because it was being stored on a barge located near the Mill Basin Bridge. It points out that the application of this unambiguous provisions justifies dismissal of this case.

Defendant details the various insurance policies that plaintiff acquired in connection with the reconstruction of the bridge and observes that the only issue before the Court is the policy it issued to plaintiff. Defendant claims that it was only able to find five cases that explicitly address a waterborne exclusion to insurance covering property damage and each case found that the provision was not ambiguous and did not compel coverage.

In opposition, plaintiff focuses on the fact that term "waterborne" is not defined in the policy. It insists that defendant's reliance on emails from plaintiff's insurance broker is misplaced and should not compel the Court to grant the motion. Plaintiff argues that defendant's overly broad interpretation of the waterborne exclusion contravenes a plain reading of the policy. It argues that the term waterborne means the property was in transit via water and so it should only apply where property is literally in transit on the water. Plaintiff maintains even if the Court were to accept defendant's interpretation, the fact is that the language is susceptible to more than one interpretation and is therefore ambiguous.

In reply, defendant insists the waterborne exclusion applies and justifies the denial of coverage. It maintains that property need not be in direct contact with the water in order for it to be deemed “waterborne” and the fact that the barge was moored does not eviscerate the exclusion at issue.

### **Discussion**

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The failure to make such a *prima facie* showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

“In this action for a judgment declaring the parties' rights under an insurance policy, this Court must be guided by the rules of contract interpretation because an insurance policy is a contract between the insurer and the insured” (*Gilbane Bldg. Co./TDX Const. Corp. v St. Paul Fire and Mar. Ins. Co.*, 143 AD3d 146, 150-51, 38 NYS3d 1 [1st Dept 2016], *affd sub nom. Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire and Mar. Ins. Co.*, 31 NY3d 131 [2018] [internal quotations and citation omitted]).

“Generally, the courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies. Well-established principles governing the interpretation of insurance contracts provide that the unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and

ordinary meaning, and that the interpretation of such provisions is a question of law for the court. If, however, there is ambiguity in the terms of the policy, any doubt as to the existence of coverage must be resolved in favor of the insured and against the insurer, as drafter of the agreement. A contract of insurance is ambiguous if the language therein is susceptible of two or more reasonable interpretations, whereas, in contrast, a contract is unambiguous if the language has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion” (*id.* at 151 [internal quotations and citations omitted]).

Here, the provision in dispute provides that “Waterborne Property- ‘We’ do not cover property while waterborne except while in transit in the custody of a carrier for hire” (NYSCEF Doc. No. 54 at 19). This paragraph is located under a section titled “Property Not Covered” (*id.* at 18).

The Court begins its analysis with the dictionary definition of “waterborne.” “In the absence of a statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase” (*Yaniveth R. ex rel. Ramona S. v LTD Realty Co.*, 27 NY3d 186, 192, 32 NYS3d 10 [2016] [internal quotations and citations omitted]).

Waterborne is defined as “supported, carried, or transmitted by water” (Merriam-Webster Online Dictionary, waterborne [<http://www.merriam-webster.com/dictionary/waterborne>] [Note: online free version]). This Court interprets the provision at issue to exclude coverage for materials that were destroyed while stored on a barge located on the water. Clearly, the materials were “supported” by water because they were being stored on the water. The exception to the

exclusion (“except while in transit in the custody of a carrier for hire”) is inapplicable to the instant circumstances as the materials were not in the process of being transported when the fire occurred.

It is undisputed that the materials were being stored for many months (April to October 2018) on a barge on the water when a fire destroyed the materials. The Court is unable to find that the provision at issue has more than one reasonable interpretation and questions under what scenario the exclusion could apply if not the present circumstances.

The Court recognizes that there are no binding cases that explore an interpretation of a waterborne exclusion to an insurance policy. The cases cited by defendant (and discussed by plaintiff) do not compel the Court to deny the motion. For instance, in *Challenger Ltd. v Albany Ins. Co.* (90 CIV. 6965 (LBS ), 1992 WL 142051, at \*3 [SD NY 1992]), a federal district court found that coverage did not apply where the exclusion stated that the policy did not cover “Property while waterborne (except while in transit on ferries or car floats).” However, this case involved items that were lost when the ship they were on sank en route to Italy (*id.*).

In *Commercial Union Ins. Co. v Advance Coating Co.* (351 So 2d 1183, 1185 [La 1977]), the Louisiana Supreme Court found that property which was located on a barge that sank was not covered under a policy exclusion stating that the policy did not cover “Loss or damage while the property is water-borne except while being transported on any regular ferry.” The Louisiana Court concluded that “In our view the property was not insured under the policy while it was water-borne, whether it was afloat on a barge at a dock or was being transported on a vessel afloat” (*id.*). Similarly, the Fourth Circuit affirmed a finding that an insurance company did not have to provide coverage for a crane that collapsed due to high winds while it was on top of a barge due to a waterborne exclusion” (*Hartford Fire Ins. Co. v T.A. Loving Co., Inc.*, 89 F3d 828

[4th Cir 1996] [considering a waterborne exclusion that excluded coverage for “property while waterborne or airborne, except while in transit in the custody of a carrier for hire”]).

The cases cited by defendant and which (as plaintiff points out) that found that coverage applied are distinguishable. In *Nichols & Thompson Core Drilling Co. v Homeland Ins. Co. of Am.*, (148 F Supp 260, 261 [D Idaho 1957]), the policy exclusion stated coverage was not afforded for “Loss or damage except by Fire while the insured property is being waterborne unless otherwise endorsed hereon.” The Court is unsure what to make of the phrase “is being waterborne” but it is sufficiently distinct to render this ruling as unpersuasive to the instant circumstances. The Court observes that the Idaho Court found that the entire phrase “is being waterborne” as capable of having multiple meanings and therefore ambiguous (*id.* at 262). That has little bearing on the policy exclusion at issue here.

Finally, the court finds that the ruling in *R.M.D. Corp. v Caliber One Indem. Co.* (194 Fed Appx 409 [6th Cir 2006]) to be inapposite and unpersuasive. The Sixth Circuit found that the exclusion for “personal property while airborne or waterborne” was a temporary condition and the loss at issue was a fire at a restaurant located on a barge (*id.* at 411). However, the decision seemed to turn on the fact that the plaintiff (R.M.D. Corp.) had a reasonable expectation that it was securing coverage for more than 30 of its restaurants, three of which turned out to be located on a barge (*id.* at 412). The Sixth Circuit also noted that the three named insureds (the three barge restaurants) for these policies all had barge in their corporate names (*id.*). In other words, the Sixth Circuit focused on the context of how the policies were procured (covering more than thirty restaurants) and that the insurance provider should have known that certain restaurants were on a barge (because “barge” was in those restaurant’s names). That is not the issue in the instant case where a policy was issued for a project to reconstruct a bridge (over

water). There is no basis to find that plaintiff had a reasonable expectation that this type of loss should be covered in spite of the waterborne exclusion. Nor is there a basis to find that defendant should somehow have expected that plaintiff would set up a storage unit on the water and expect defendant to provide coverage for it, despite a waterborne exclusion.

These cases, taken together, suggest that items contained or stored on a barge are waterborne under a plain meaning of that term and the language of the exclusion as a whole. The loss at issue here is not eligible for coverage under a policy that contains a waterborne exclusion. Plaintiff's efforts to confuse the meaning of the term "waterborne" are without merit. Of course, nearly every phrase can have multiple meanings. But this Court must evaluate whether those suggested alternative meanings are reasonable. Plaintiff's attempt to dissect the exclusion at issue here would render it virtually meaningless.

Plaintiff's argument that the Court should consider the term waterborne as analogous to an exclusion for airborne property is inapposite. Unlike water, where property can be stored on a stationary vessel such as a barge, property that is airborne must, by its very nature, be on the move. It cannot be suspended in air indefinitely without also being attached to another item located on land or water (such as a crane holding up materials; the crane itself is not airborne).

That the barge was purportedly moored to the fender piles surrounding the new bridge and that it was allegedly used as a stationary working material storage platform is of no moment. Those purported assertions do not change the undisputed fact that the materials were located on a barge which was on the water. That leads to only one conclusion: that the materials which were damaged in the fire were waterborne.

Because the Court is issuing a determination on the merits of the declaratory judgment claim against plaintiff, it must issue a declaration in defendant's favor (*Spada v Aspen Univ., Inc.*, 202 AD3d 494, 495, 163 NYS3d 27) [1st Dept 2022]).

Accordingly, it is hereby

ORDERED that the motion by defendant for summary judgment dismissing the complaint is granted, the complaint is dismissed, and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor; and it is further

DECLARED that defendant's denial of plaintiff's claim seeking coverage arising out of the October 12, 2018 fire from the subject policy (NYSCEF Doc. No. 54) was proper and defendant owes no duty to provide coverage for a claim from plaintiff concerning damages sustained to property in the subject fire.

6/3/2022  
DATE

  
ARLENE BLUTH, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED  DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE