87 Uptown Rd., LLC v Country Mut. Ins. Co.
2022 NY Slip Op 35205(U)
December 14, 2022
Supreme Court, Tompkins County
Docket Number: Index No. EF2021-0338
Judge: Mark G. Masler
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At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Cortland County Courthouse, in the City of Cortland, New York, on the 4th day of November 2022.

PRESENT: HON. MARK G. MASLER
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF TOMPKINS

87 UPTOWN ROAD, LLC,

Plaintiff,

v

COUNTRY MUTUAL INSURANCE COMPANY,

Defendant.

DECISION AND ORDER

Index No. EF2021-0338
RJI No. 2021-0373-C

APPEARANCES:

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MARK G. MASLER, J. S. C.

Plaintiff owns an apartment complex at 87 Uptown Road in the Village of Lansing comprised of 11 apartment buildings containing a total of approximately 200 apartment units, an administrative building, and a pool (the property). The entire property was covered by a single insurance policy issued by defendant that was in effect when a fire occurred on October 22, 2019. The fire severely damaged Building D, but did not cause any of the apartments located in other buildings to become uninhabitable. Defendant paid more than $2 million for the property damage claim, and $86,238 for lost business income, which defendant contends fully compensated plaintiff for lost business income attributable to vacancies in units that were physically damaged by the fire. Plaintiff commenced this action seeking, as relevant here, an additional $54,839 in lost business income for rental income lost from the entire apartment complex, including tenants who vacated apartments that were not physically damaged by the fire, or units that suffered only superficial damage and remained habitable, contending that such vacancies were attributable to the physical damage sustained by Building D and the common area of the apartment complex. Defendant now moves for summary judgment.

The Court of Appeals has instructed that

> "[i]n determining a dispute over insurance coverage, we first look to the language of the policy. As with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court. Of course, where the policy may be reasonably interpreted in two conflicting manners, its terms are ambiguous, and any ambiguity must be construed in favor of the insured and against the insurer" (Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co., 28 NY3d 675, 681-682 [2017] [internal quotation marks and citations omitted]).

As relevant herein, the policy provides that "[w]e 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" (NY St Cts Elec Filing [NYSCEF] Doc No. 18, Sasiadek aff, Exhibit B, at 44, business owners coverage form, § I [A] [5] [f] [1] [a]). The policy defines suspension of operations as "(a) The partial slowdown or complete cessation of your business activities; or (b) That a part or all of the premises is rendered untenantable, if coverage for Business Income applies" (NYSCEF Doc No. 18, Sasiadek aff, Exhibit B, at 45, business owners coverage form, § I [A] [5] [f] [3]). Based on these provisions, defendant contends that there is no coverage for lost business income alleged to have been sustained by reason of vacancies in apartment units that were not rendered uninhabitable by the fire. Plaintiff contends, on the other hand, that vacancies in the units that were not rendered uninhabitable by the fire are attributable to the tenants' dissatisfaction with conditions which resulted from the physical damage caused by the fire and, therefore, represent a partial slowdown of business activities entitling it to coverage for lost business income.

The policy is unambiguous. It provides coverage only for lost business income which is "caused by direct physical loss of or damage to property at the described premises." This unambiguous provision is not altered by the provision defining suspension of operations. Notably, the provision defining suspension of operations allows plaintiff to avoid the construction of the policy that would impose a requirement that all operations at the insured premises cease in order for there to be any coverage for lost business income (see Broad St., LLC v Gulf Ins. Co., 37 AD3d 126, 130 [2006]; see also Yar-Lo, Inc. v Travelers Indem. Co., 130 AD3d 1402, 1403 [2015]), because it obligates the insurer to pay for lost business income caused by direct physical damage to only a portion of the insured premises, as happened here, where defendant paid plaintiff for lost income from the apartment units that were directly damaged by the fire. Stated differently, if not for the provision defining suspension of operations to include a partial slowdown or a situation in which only a part of the premises becomes untenantable, plaintiff may have received no coverage for lost business income – even that attributable to the destruction of Building D – because it continued to operate at the premises after the fire.

The court was unable to locate any New York precedent applying the applicable policy provisions to similar facts, i.e. when a portion of the insured premises is damaged yet operations continue in the undamaged portion thereof. However, the court finds persuasive the reasoning set forth in Royal Indem. Ins. Co. v Mikob Props., Inc., 940 F Supp 155 (SD Texas 1996), which corroborates this court's conclusion that the policy at issue in this case excludes coverage for lost business income for apartment units that were not directly damaged by the fire. Royal Indemn. Ins. Co. v Mikob Props., Inc. was based on facts very similar to this action: the insured premises was comprised of three apartment buildings and associated amenities, including a boardwalk, a lighted fishing pier, a boat ramp, and a picnic area. A fire completely destroyed one of the buildings, and caused only minor damage to the other two, which remained habitable. The relevant provisions of the policy were similar to those in this action. The court noted that even if the character of the apartment complex was adversely impacted by the fire, there was no necessary suspension of operations in the buildings that had not sustained direct physical damage and concluded, therefore, that the policy did not provide lost business income coverage for the undamaged buildings (id. at 160).

Based on the foregoing, defendant's motion is granted, and the complaint is dismissed, with prejudice.

This decision constitutes the order of the court. The filing of this decision and order, or the transmittal of copies hereof, by the court shall not constitute notice of entry (see CPLR 5513).

Dated: December 14, 2022
Cortland, New York

ENTER

MGMC

Digitally signed by Hon. Mark G. Masler
DN: C=US, OU=Cortland County Supreme Court, O=Sixth Judicial District, CN=Hon. Mark G. Masler, E=crtmasler_chambers@nycourts.gov
Date: 2022.12.14 11:19:21-05'00'

HON. MARK G. MASLER
Supreme Court Justice

The following documents filed with the Clerk of the County of Tompkins via New York State Courts Electronic Filing System were considered on this motion (see CPLR 2219 [a]):

Document Numbers 14-22; 24; 29-36; 38.