

**Securities Indus. & Fin. Mkts., Inc. v Certain
Underwriters at Lloyd's of London**

2023 NY Slip Op 33531(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 656239/2020

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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SECURITIES INDUSTRY AND FINANCIAL MARKETS, INC.,	INDEX NO. <u>656239/2020</u>
Plaintiff,	MOTION DATE <u>N/A</u>
- v -	MOTION SEQ. NO. <u>004</u>
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, Defendant.	DECISION + ORDER ON MOTION
-----X	

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 91, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 185, 218, 219, 220, 222

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The issue in this action is whether defendant Certain Underwriters at Lloyd's of London (Underwriters) breached an event cancellation insurance policy (Policy), purchased by plaintiff Securities Industry and Financial Markets Association, Inc. (SIFMA), when Underwriters denied coverage of losses incurred due to SIFMA's cancellation of three conferences due to COVID-19.

In motion sequence number 004, Underwriters moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint with prejudice. In its opposition papers, SIFMA invokes CPLR 3212(b), which empowers the court to grant summary judgment to the nonmoving party without the necessity of a cross-motion.

Background

The Policy was effective from October 25, 2019 to May 15, 2020 and contains a Communicable Disease Exclusion (Exclusion). (NYSCEF Doc. No. [NYSCEF] 182, SIFMA’s Rule-19 Counterstatement ¶¶ 1, 10;¹ NYSCEF 3, Policy.)

The Insured Events² at issue are enumerated in the Policy’s “Schedule of Events”: (1) Securities Industry Institute scheduled for March 8–13, 2020 at the University of Pennsylvania; (2) Compliance and Legal (C&L) Annual Seminar scheduled for March 15–18, 2020 in Orlando, Florida; and (3) Operations Conference scheduled for April 21– 24, 2020 in San Diego, California. (NYSCEF 3, Policy at 3–4.³)

Section 1 of the Policy provides, in relevant part, that

“[u]nless limited or endorsed otherwise, this insurance indemnifies the Named Insured against any loss occurring subsequent to the Insurance Effective Date and causing the unavoidable:

1. Cancellation, Curtailment, Postponement, Removal to Alternative Premises, or Abandonment of the Event; or ...
4. Enforced Reduced Attendance;

arising from an unexpected cause beyond the control of the Named Insured

Underwriters’ limit of indemnity for loss is the applicable limit set forth in the declarations and/or any endorsements attached hereto.”

¹ The parties were unable to stipulate to a joint Rule 19-a Statement. (NYSCEF 55, Rayburn aff ¶ 27.) Thus, the court will only cite to undisputed facts unless otherwise noted.

² The Policy defines an “Insured Event” as “conference, meeting, board meeting, show, exhibition, convention, exposition, trade show or any other event which is insured under this insurance, and includes installation and dismantling of the Insured Event during the period shown on the declarations page up to and including the date that the Named Insured vacates the venue.” (NYSCEF 3, Policy at 21.)

³ Pages refer to NYSCEF generated pagination.

(*Id.* at 10.)

The Exclusion provides that

“[t]his insurance does not cover loss arising directly or indirectly as a result of any communicable disease or the threat or fear of communicable disease (whether actual or perceived)

This exclusion shall not apply unless prior to or simultaneously with the loss arising, the communicable disease is declared an epidemic or pandemic by the World Health Organization (WHO) or by Federal or Local Government Agency. However, any threat or fear of communicable disease, whether actual or perceived, is excluded.”

(*Id.* at 7.)

On January 30, 2020, at a press briefing, the Director-General of the WHO said that he was “declaring a public health emergency of international concern over the global outbreak of novel coronavirus.” (NYSCEF 60, WHO Director-General’s Statement on IHR Emergency Committee on Novel Coronavirus [2019-nCoV]” at 3.)

At a February 21, 2020 press conference, the Director-General of the WHO stated that “WHO’s key role is co-ordinating the global response to the epidemic.” (NYSCEF 63, February 21, 2020 WHO Coronavirus Disease (COVID-19) Press Conference at 3.) At a February 24, 2020 press conference, the Director-General made the following statements: “[t]hey found that the epidemic peaked and plateaued between the 23rd January and 2nd February and has been declining steadily since then;” “[t]here is a lot of speculation about whether this increase means that this epidemic has now become a pandemic. We understand why people ask that question. WHO, as you know, has already declared a Public Health Emergency of International Concern;” “[w]hat we see are epidemics in different parts of the world affecting countries in different ways.” and that the Who “is monitoring the evolution of the epidemic around the clock.”

(NYSCEF 64, February 24, 2020 WHO Coronavirus Disease (COVID-19) Press Conference at 3-4.)

At a February 25, 2020 mission briefing, the Director-General stated that “[a] lot has changed since we briefed you last Wednesday, which illustrates the rapidly evolving nature of this epidemic,” and that the WHO was “monitoring the evolution of the epidemic around the clock.” (NYSCEF 65, WHO Director-General's Opening Remarks at the Mission Briefing on COVID-19 at 2, 4.) The Director-General also stated that “[t]he increase in cases outside China has prompted some media and politicians to push for a pandemic to be declared,” but “should not be too eager to declare a pandemic without a careful and clear-minded analysis of the facts.” (*Id.* at 4.)

At a press briefing on March 5, 2020, the Director-General stated that “[t]his epidemic can be pushed back” and that “this epidemic is a threat for every country.” (NYSCEF 68, March 5, 2020 WHO Coronavirus Press Conference at 3.) At a press briefing on March 11, 2020, the Director-General stated that the WHO had “made the assessment that COVID-19 can be characterized as a pandemic.” (NYSCEF 69, March 11 2020 WHO COVID-19 Press Conference at 2.) On March 13, 2020, then-President Donald Trump issued Proclamation 9994, which provided that “[o]n March 11, 2020, the World Health Organization announced that the COVID-19 outbreak can be characterized as a pandemic, as the rates of infection continue to rise in many locations around the world and across the United States,” and “that the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020.” (NYSCEF 71, Proclamation 9994 at 2.)

The first event, the Securities Industry Institute, was cancelled on March 5, 2020. (See NYSCEF 75, Claim Submission Email [May 1, 2020] at 13.) On March 6, 2020, SIFMA canceled the C&L Annual Seminar in Florida. (*Id.* at 15; see also NYSCEF 76, C&L Cancellation Email.) On March 10, 2020, SIFMA canceled the Operations Conference in California. (*Id.* at 17.)

On March 9, 2020, SIFMA notified Underwriters of the cancellations and sought coverage under the Policy. (NYSCEF 77, Notice of Claim at 3.) On June 10, 2020, Underwriters denied coverage. (NYSCEF 79, Coverage Determination Email and Letter at 2.) According to the Coverage Determination Letter, “[t]he reasons for this determination includes, but is not limited to, the following”:

“The Insured Event Cancellations were caused directly or indirectly by communicable disease (Coronavirus / COVID-19), which was declared by the World Health Organization (WHO) as an epidemic on February 25, 2020, was reiterated as being an epidemic by the Director General at the briefing at the World Health Organization (WHO) on March 05, 2020 and a pandemic on March 11, 2020. Losses arising directly or indirectly as a result of communicable disease or the threat or fear of communicable disease (whether actual or perceived) are excluded under the Communicable Disease Exclusion.”

(*Id.* at 14–15.)

SIFMA alleges Underwriters breached the Policy by refusing coverage and seeks an order declaring that Underwriters is obligated to indemnify SIFMA for its losses.

Legal Standard

Summary judgment should be granted only when it is clear that no triable issue of fact exists. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986] [citation omitted].) On a motion for summary judgment, the burden is on the movant to make a showing of

entitlement to summary judgment as a matter of law. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) If such a showing has been made, the burden shifts to the opposing party to produce sufficient evidence to establish the existence of material issues of fact. (*Id.*) In deciding a summary judgment motion, the “evidence must be analyzed in the light most favorable to the party opposing the motion.” (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997] [citation omitted].)

Discussion

The parties do not dispute that the Exclusion bars coverage if the WHO or other relevant government body declared an epidemic or pandemic prior to or simultaneously with the loss, i.e., the event cancellation. However, what is disputed is the meaning of the word “declared.” (NYSCEF 3, Policy at 7.) On the record, this court held that the word declared is ambiguous. (NYSCEF 218, tr at 31:24-32:2, 35:17-36:5.)

“[W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. 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. Indeed, before 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.”

(*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984] [internal quotation marks and citations omitted]; see also *J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 37 NY3d 552, 562 [2021].) Policy exclusions are only enforced when they are found “to have a definite and precise meaning, unattended by danger of misconception . . . and concerning which there is no reasonable basis for a difference of opinion.” (*Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307 [2009] [internal

quotation marks and citation omitted].) “[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.” (*Universal Am. Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, PA.*, 25 NY3d 675, 680 [2015] [internal quotation marks and citations omitted].)

The relevant part of the Exclusion states that “[t]his exclusion shall not apply unless prior to or simultaneously with the loss arising, the communicable disease *is declared* an epidemic or pandemic by the World Health Organization (WHO) or by Federal or Local Government Agency.” (NYSCEF 3, Policy at 7 [emphasis added].) The term declared is not defined in the Policy, but in common speech it is defined as “to make known formally, officially, or explicitly” or “to make known as a determination.” (Merriam-Webster Collegiate Dictionary, declare [<https://www.merriam-webster.com/dictionary/declare>] [online free version].)

SIFMA argues that declared, as used in the Exclusion, requires an element of formality or weight and the term carries with it a heightened level of significance. Thus, according to SIFMA, it was not until March 11, 2020 that the WHO actually declared a pandemic when it stated “that COVID-19 can be characterized as a pandemic.” (NYSCEF 69, March 11 2020 WHO COVID-19 Press Conference at 2.) In contrast, Underwriters contends that declared, as used in the Exclusion, does not require a formal instrument or proclamation of an epidemic or pandemic to trigger the application of the Exclusion. Underwriters asserts that WHO’s numerous public statements, starting as early as February 21, 2020, calling coronavirus an epidemic are declarations by the WHO and triggered the application of the Exclusion, barring coverage of SIFMA’s

losses as a result of its cancellations after the WHO's declaration of epidemic.

Underwriters claims that accepting SIFMA's interpretation of declared would necessarily require adding a condition of formality that does not exist on the face of the Exclusion.

Reviewing the Exclusion, the word declared is susceptible to two reasonable interpretations, lacking a definite and precise meaning. Despite Underwriters objections, it is not unreasonable that the average insured, upon reading the Exclusion, would reasonably expect that declaring an epidemic or pandemic would require a formal, official, or explicit statement. It is not clear what declared requires in the context of the Exclusion. Based on the common usage (make known formally, officially, or explicitly), it is not unreasonable that an average insured would expect an element of formality or weight and a heightened level of significance. Thus, it is ambiguous.

“Where an insurance policy reasonably lends itself to two conflicting interpretations, its terms are ambiguous and must be construed in favor of the insured and against the insurer, the drafter of the policy language. This rule of construction is especially true where, as here, the language at issue appears in an exclusion limiting the insurer's exposure. [P]olicy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer.”

(*242-44 E. 77th St., LLC v Greater NY Mut. Ins. Co.*, 31 AD3d 100, 105 [1st Dept 2006] [internal quotation marks and citations omitted].) If the court applies the common usage of the word declared, the Who's references to “the epidemic” or “this epidemic” cannot be categorized as a formal, official or explicit act of declaring an epidemic, like when the WHO explicitly stated “that COVID-19 can be characterized as a pandemic.” (NYSCEF 69, March 11 2020 WHO COVID-19 Press Conference at 2.) Rather, those references implied that the WHO had characterized coronavirus as an epidemic. (NYSCEF 63, February 21, 2020 WHO Coronavirus Disease (COVID-19) Press Conference at 3;

NYSCEF 64, February 24, 2020 WHO Coronavirus Disease (COVID-19) Press Conference at 3-4; NYSCEF 65, WHO Director-General's Opening Remarks at the Mission Briefing on COVID-19 at 2, 4; NYSCEF 68, March 5, 2020 WHO Coronavirus Press Conference at 3.) This Exclusion must be construed in SIFMA's favor.

Accordingly, it is

ORDERED that defendant Certain Underwriters at Lloyd's of London's motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint with prejudice is denied; and it is further

ORDERED that summary judgment is granted in favor of plaintiff Securities Industry and Financial Markets Association, Inc. pursuant to CPLR 3212(b) on its claim for a declaratory judgment; and it is further

ADJUDGED and DECLARED that Certain Underwriters at Lloyd's of London are obligated fully to indemnify Securities Industry and Financial Markets Association, Inc. for the financial harm it has suffered and continues to suffer in connection with the cancellation of and/or reduced attendance at the Insured Events; and it is further

ORDERED that summary judgment is granted in favor of plaintiff Securities Industry and Financial Markets Association, Inc. pursuant to CPLR 3212(b) as to liability only on its claim for breach of contract; and it is further

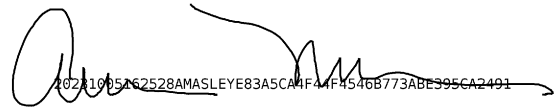
ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this court, unless the parties stipulate to permit the JHO or Special Referee to hear and determine pursuant to CPLR 4317(a), on the issue of damages in regard to plaintiff's breach of contract claim; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.


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10/5/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE