DECISION AND ORDER

FILED & ENTERED
1/12/2014

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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CASTLE OIL CORPORATION,

Plaintiff,

MOTION DATE:12/13/13
INDEX NO.: 55812/13

-against-

ACE AMERICAN INSURANCE COMPANY,

Defendant.
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The following papers numbered 1 to 12 were read on this motion by plaintiff for partial summary judgment, and on this cross-motion for summary judgment dismissing the complaint.

Papers Numbered

Notice of Motion - Affidavit (Carey) - Exhs. (A-C) - Affirmation (Halprin) - Exhs. (1-4) - Memorandum of Law ...1-6
Notice of Cross-Motion - Affirmation (Rocco) - Exhs. (A-E) - Affidavit (McGovern) - Memorandum of Law 7-11
Replying Memorandum of Law 12

Upon the foregoing papers, it is Ordered and adjudged that this motion and cross-motion are disposed of as follows:

This is a breach of contract action in which the parties

dispute the coverage afforded plaintiff under a commercial property insurance policy sold by defendant and specifically what is the applicable deductible amount.

Plaintiff owns and operates a fuel oil terminal located in the Port Morris section of the Bronx, adjacent to the East River; this terminal supplies energy to the City of New York and serves as a port facility for the receipt, storage and shipment of petroleum products by barge and tanker. In 2012, the terminal had been covered by a commercial property policy issued by defendant and, in addition to the policy's covering the property against "all risks of direct physical loss or damage occurring during" the policy period, an endorsement to the policy further extends the coverage to specifically include loss caused by flood. The policy contains a sublimit of $2.5 million annual aggregate for "flood including storm surge located in special flood hazard areas ... AE ... as defined by FEMA." An additional endorsement provides that the deductible applicable to flood loss in special flood hazard areas is equal to "2% of the total insurable values at risk per location subject to a minimum of $250,000.00."

In October, 2012, as a result of Superstorm Sandy having caused water levels to rise and storm surges, the terminal had suffered damages totaling $2,284,293.95. Plaintiff promptly had presented its claim for insurance coverage to defendant.

In response to plaintiff's claim, defendant's agent had advised plaintiff, by correspondence dated December 17, 2012, that the affected location is within the AE flood zone, that the $2,500,000.00 limitation applies to the flood damage, and that pursuant to the policy deductible set forth in a policy endorsement and the "Statement of Values" for "the loss location," as set forth in a policy endorsement as being a total insurable value of $124,701,000, the applicable deductible for the subject loss was $2,494,020.00. Since plaintiff's claimed damages of $2,284,239.95 fell below the calculated $2,494,202.00 deductible, defendant had claimed then, and presently persists in its claim, that the policy does not respond to plaintiff's claimed loss.

In response thereto, plaintiff's counsel had advised defendant, by correspondence dated March 6, 2013, that defendant's position with respect to the deductible amount was incorrect. Plaintiff's counsel maintained in said letter, and continues to maintain herein, that defendant incorrectly reads the deductible applicable to flood provision to mean that the deductible should be two percent of the value of *all property at the Terminal*, which the policy sets forth as being $124,701,000, notwithstanding that a policy endorsement expressly provides that the aggregate values set forth are "for premium purposes only." According to plaintiff's counsel, based upon the express policy terms, the correct

interpretation of the deductible applicable to flood loss is that the deductible applies to the "insurable values" of property at the terminal actually "at risk" of flood damage. Accordingly, plaintiff's urged position is that, since there is a stated $2.5 million sublimit on coverage against flood damage at the terminal, $2.5 million is the maximum "total insurable values at risk for flood loss, and because two percent of $2.5 million is less than the $250,000.00, the deductible for the loss is $250,000.00. This interpretation, plaintiff contends, gives meaning to the phrase "at risk," which defendant's interpretation otherwise wholly ignores.

The disagreement between the parties relating to the applicable deductible having remained unresolved, plaintiff commenced this action, alleging as against defendant a single cause of action for breach of contract seeking "damages for all losses incurred to date by Castle Oil or which may be incurred up to the applicable sublimits under the policy, ... including ... reasonable attorneys' fees ..." Presently, plaintiff is moving for partial summary judgment "declaring that the deductible applicable to the flood damage, as set forth in the commercial property insurance policy sold to castle Oil by defendant ACE ... is 2% of the applicable sublimit subject to a minimum of $250,000," as well as for judgment dismissing defendant's affirmative defense asserting that :

> the Policy does not respond to Plaintiff's claims because the total claimed damages fall below the Policy's flood deductible...
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> The "total insurable values at risk" as submitted to ACE for the Port Morris Terminal are $124,701,000 and the flood deductible at this location is properly calculated at $2,494,020. As Plaintiff's total claimed damages fall below this deductible, the Policy does not respond with coverage.

Defendant is cross-moving for summary judgment dismissing plaintiff's complaint.

Initially, the Court notes that "While under certain circumstances, a summary judgment application may be entertained based on a theory of recovery not pleaded, the general rule is that summary judgment will not be granted based upon a cause of action or a defense that has not been pleaded." See Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3212:11, at 319. This requirement 'is intended to show the court precisely what the parties' positions are.' (Citation omitted)." Moscato v. City of N.Y., 183 A.D.2d 599, 601 (1st Dept. 1992). Thus, while Courts may grant summary judgment on an unpleaded cause of action by amending the pleading to conform it to the proof, Weinstock v. Handler, 254 A.D.2d 165, 166 (1st Dept. 1998), "if the proof supports such a claim and if the opposing party has not been

misled to its prejudice," Kramer v. Danalis, 49 A.D.3d 263, 264 (1st Dept. 2008), the general rule is that summary judgment may not be obtained on an unpleaded claim given the prejudice that results to the opposing party nor may the Court deny summary judgment based on such an unpleaded cause of action. See Mezger v Wyndam Homes, Inc., 81 A.D.3d 795, 796 (2d Dept. 2011).

The Court will entertain plaintiff's motion for partial summary judgment seeking a declaratory judgment notwithstanding that plaintiff never pleaded such theory of relief. It is apparent from the record at bar that the raised issue of how to properly apply the deductible policy provision is the crux of this matter, having been raised and continuously argued by the parties long before this action had been commenced. There certainly is no prejudice to defendant by the Court's entertaining the issue in this format, defendant itself having pleaded its position regarding how the deductible properly is to be applied as an affirmative defense herein and its not having objected to plaintiff's motion on the ground that no such relief had been pleaded.

Upon this Court's careful review of the record at bar, consideration of the parties' respective arguments and application of controlling principles of law, the Court hereby grants plaintiff's motion for partial summary judgment and judgment dismissing defendant's sixth affirmative defense; concomitantly,

defendant's cross-motion for judgment dismissing plaintiff's complaint is denied.

"Insurance contracts must be interpreted according to common speech, consistent with the reasonable expectations of the insured," Cragg v. Allstate Indem. Corp., 17 N.Y.3d 118, 122 (2011), according to the plain and ordinary meaning of the words. See Sanabria v. American Home Assur. Co., 68 N.Y.2d 866, 868 (1986). In other words, insurance policies are to be interpreted so as to give effect to the intent of the parties as expressed in the clear language of the policy, see Village of Sylvan Beach v. Travelers Indem. Co., 55 F.3d 114, 115 (2nd cir. 1995), and so that no contract words are rendered meaningless. See Richner Communications, Inc. v. Tower Ins. Co. of New York, 72 A.D.3d 670, 671 (2nd Dept. 2010). In construing an insurance policy, Court should examine the policy as a whole, endeavoring to give meaning to every provision. Id.

Reviewing the policy at bar, the Court notes that "values at risk" is not defined in the Policy. Thus, finding that there exists a reasonable basis for a difference of opinion, as urged respectively by the parties, as to what this language means, it is incumbent upon this Court to construe the words according to the meaning as would be understood by a reasonable person in the insured's position. See Federal Insurance Co. v. International

Business Machines Corp., 18 N.Y.3d 642, 646 (2012).

Applying the foregoing construction principles to the insurance policy and endorsements at bar, this Court finds that the subject deductible language for the peril of flood, to wit, "2% of the total insurable values at risk per location subject to a minimum of $250,000.00," requires the deductible to be calculated based upon the $2,500,000.00 sublimit which the parties had agreed is the amount "at risk," and that the applicable deductible at bar, given the value of plaintiff's loss, is the minimum amount of $250,000.00.

While defendant's agent Delia McGovern avers that, "simply stated, the Policy applies a flood deductible 'per location,' calculated at 2% of the total insurable valued of the location," and that plaintiff, as part of the underwriting process, had submitted total insurable values, reflected in a Policy endorsement, as being $124,701,000.00, resulting in a calculated flood deductible of $2,494,020.00, it is apparent, firstly, that defendant's stated position disregards the indisputable facts that the insurable value of $124,701,000.00 reflected in a Policy endorsement expressly includes the disclaimer that same was being set forth "for premium purposes only," and that nowhere in the Policy or any endorsement thereto is it stated that the sum of $124,701,000.00, would be used as the "total insurable values at

risk per location ..." for the purpose of calculating the applicable deductible.

Secondly, to accept defendant's interpretation of how the deductible is to be calculated clearly and impermissibly results in the Policy language "at risk," which language defendant itself had drafted and included in the subject endorsement, as being without meaning. The "values at risk" language necessarily refers to the policy's sublimit amount, and not the total value of the property insured under the Policy, as defendant maintains, because the insurance company expressly is "at risk" of paying only the full amount of the sublimit. To accept defendant's interpretation, using the purported $124,701,000.00 total insured value would result in the minimum deductible amount being $2,494,020.00, leaving, after application of the $2,500,000.00 minimum deductible, no required response by defendant for this multimillion dollar loss sustained by plaintiff. Manifestly, this could not have been plaintiff's intent, and said construction necessarily would render the flood damage sublimit of $2,500,000.00 absolutely meaningless and the flood insurance plaintiff believed it had procured illusory.

This Court's finding that plaintiff's interpretation is correct and that the 2% deductible of "values at risk" applies to the sublimit of $2.5 million which defendant had been "at risk" of

paying is in accord with several Federal cases wherein identical language and respectively similar arguments to that made by the parties at bar had been made. See Terr-Adi International Dadeland, LLC v. Zurich American Ins. Co., 2007 WL 675971 (S.D. FL. 2007); Landscapes Unlimited, LLC v. Lexington Ins. Co., (N. Dist. 2006).

Defendant's reliance upon El-Ad Residences v. Mt. Hawley Ins. Co., 2010 WL 8961438 (S.D. FL.2010) is inapposite. That action involved a 3% windstorm and hail deductible of "3% of the total values at risk per building." The El-Ad Residences Court ultimately had interpreted this to mean 3% of the total insured values as opposed to the sublimit amount, which appears to be in accord with defendant's position at bar. However, the El-Ad Residences Court, in reaching that result, specifically had noted that other deductible provisions in the policy explicitly stated that they applied to the corresponding sublimit and that the absence of such a provision in the windstorm and hail deductible necessarily had meant that the deductible was not intended to apply to the sublimit. At bar, by contrast, the flood deductible is the only percentage-based deductible provision in the subject policy, and thus the absence of a reference to the sublimit is not indicative of any intent to require plaintiff to apply the deductible to the total insured value at the terminal.

Finally, to the extent that there is any ambiguity in the

Policy endorsement as to how the deductible is to be calculated, this Court perceives no basis for departing with the general rule pertaining to ambiguities in insurance policy exclusionary clauses, which construes the provision liberally in favor of the insured and strictly against the drafter. See Cragg v. Allstate Indem. Corp., supra, 17 N.Y.3d at 122.

The parties shall appear in the Compliance Conference Part, Room 800, at 9:30 a.m., on March 3, 2014.

Dated: ~~December~~ January 2, 2014
White Plains, New York

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