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

CLEARY GOTTLIEB STEEN & HAMILTON LLP,	:	
Plaintiff,	:	Index No. 653829/2013
- against -	:	MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
FEDERAL INSURANCE COMPANY,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiff Cleary Gottlieb Steen & Hamilton LLP ("the Insured") respectfully submits this Memorandum of Law, accompanied by its Rule 19-a Statement, in support of its motion for partial summary judgment on liability pursuant to CPLR § 3212.

PRELIMINARY STATEMENT

The Insured paid Defendant Federal Insurance Company's ("the Insurer") several hundred thousand dollars in premiums to obtain insurance policy 3528-83-06 EUC ("the Policy"). Among other things, the Policy insures against lost business income caused by a loss of utilities due to flooding. As Insurer admits in its Answer, hurricane "Sandy caused massive flooding in parts of Lower Manhattan on October 29, 2012, and . . . flooding to Con Edison's property caused a loss of electrical and other utility power affecting [the Insured's] Premises." Answer ¶ 13. However, rather than make good on its obligations to its Insured, the Insurer has adopted an untenable reading of the Policy to disclaim coverage for the Insured's resulting loss of business income.

Because the correct interpretation of the Policy language is a matter of law for the court to decide, the Insured brings this motion for partial summary judgment seeking a ruling that the Insurer is liable under the Policy for the business income the Insured lost because of the loss of utilities caused by flooding. The Policy unambiguously requires the Insurer to provide coverage, and even if this Court finds the Policy language ambiguous the law requires that any ambiguity be resolved in favor of the Insured.

STATEMENT OF UNDISPUTED FACTS

The following facts were either admitted in the Insurer's Answer, are direct quotes from the Policy, or are otherwise admitted by the Insurer. A true and correct copy of the

Policy has been provided as Exhibit A to the supporting Affirmation of Jonathan I. Blackman, dated January 31, 2014.[1]

A. The Insured Lost Business Income As a Result of Flooding Caused by Hurricane Sandy

On October 29, 2012, Hurricane Sandy caused massive flooding in parts of lower Manhattan, including flooding to energy-provider Con Edison's property. *See* Rule 19-a Statement ¶ 6. As a result, the Insured's three insured Manhattan locations, One Liberty Plaza, 83 Maiden Lane, and 22 Cortlandt Street, lost electrical power and other utility services. Rule 19-a Statement ¶ 6. On or about November 1, 2012, the Insured submitted a claim to the Insurer described as "Hurricane Sandy Loss," for a loss of business income the Insured suffered when it had to close its offices for several days because of the loss of utilities. Ex. C; Rule 19-a Statement ¶ 7. The Insurer denied the claim on the alleged ground that the Insured's loss of business income due to loss of utilities caused by flooding is not covered under the Policy. Rule 19-a Statement ¶ 8.

B. The Insurance Policy

On or about September 1, 2012, the Insurer issued the Policy to the Insured for the period September 1, 2012 to September 13, 2013, covering the Insured's offices at One Liberty Plaza, 83 Maiden Lane, and 22 Cortlandt Street. Rule 19-a Statement ¶ 1.

The Policy provides coverage for Business Income with Extra Expense arising from a Loss of Utilities, with a policy limit of $6,500,000. Rule 19-a Statement ¶ 2. Specifically, the Policy states:

> We will pay for the actual:
>
> - **business income** loss you incur due to the actual impairment of your **operations**;
>
> . . .

[1] All exhibits cited herein are exhibits to the Blackman affirmation.

during the **period of restoration**, not to exceed the applicable Limit Of Insurance for Loss of Utilities shown under Business Income in the Declarations.

. . . caused by or result[ing] from direct physical loss or damage by a **covered peril** to: . . .

- **personal property of a utility** located either inside or outside of a building; or

. . . necessary to supply your premises with: . . .

- communication supply; . . .
- power supply; . . .
- on-line access, . . .

services. Ex. A at 88-89; Ex. B at 2-3.

The Policy goes on to provide that Loss of Utilities coverage "does not apply if the direct physical loss or damage is caused by or results from earthquake or **flood**" (the "Flood Exclusion"). Ex. A at 89; Ex. B at 3. However, Form 80-02-1698 of the Policy ("the Flood Endorsement") *removes* the Flood Exclusion, providing:

This Endorsement applies to the following forms: . . .

Business Income with Extra Expense

. . .

Under Additional Exclusions, and only with respect to the premises shown in the Schedule above, *the Flood exclusion is deleted from the forms shown above* (emphasis added).

After deleting the Flood Exclusion, the Flood Endorsement then provides that:

E. The Flood exclusion and any **flood** limitations are not deleted and remain in effect for

. . . 5. Loss of Utilities . . .

unless these Premises Coverages or Additional Coverages are shown in the Schedule above (emphasis added). Ex. A at 219-23; Ex. B at 4-8.

As the Insurer conceded in its May 7, 2013 letter purporting to deny coverage, "the Business Income and Extra Expense coverage form is listed in the Flood Endorsement Schedule." Ex. D

at 2. And the Loss of Utilities Coverage is an Additional Coverage in the Business Income and Extra Expense form, *i.e.* it is one of the Coverages "shown in the Schedule above" for which the "Flood exclusion and any **flood** limitations" stay deleted. Ex. A at 221-23; Ex. B at 6-8.

ARGUMENT

I. Legal Standards

Summary judgment is appropriate when an issue is "established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR § 3212(b), (e). New York courts have consistently held that the interpretation of an insurance policy presents a question of law properly determined on summary judgment. *Caliendo v. Travelers Indem. Co.*, 225 A.D.2d 574, 574 (2d Dep't 1996); *Park Country Club of Buffalo, Inc. v. Tower Ins. Co. of N.Y.*, 893 N.Y.S.2d 408, 409 (4th Dep't 2009) (granting the insured summary judgment after determining that the policy unambiguously provided coverage); *Hartford Ins. Co. of Midwest v. Halt*, 646 N.Y.S.2d 589, 594 (4th Dep't 1996), *lv. denied*, 89 N.Y.2d 813 (1997) (granting the insured summary judgment after finding that a policy exclusion did not bar coverage). In interpreting policy language, New York courts focus on the "reasonable expectations of the average insured upon reading the policy and employing common speech." *Matter of Mostow v. State Farm Ins. Cos.*, 88 N.Y.2d 321, 326-27 (1996); *Whiteside v. Ins. Co of State of Pa.*, 274 A.D. 36, 39 (1st Dep't 1948) ("courts have repeatedly held that the interpretation of a clause in a policy of insurance is to be determined by what it means to the ordinary businessman, not what it might convey on careful analysis to a trained lawyer.").

Even where a policy is ambiguous, as long as it does not require reference to extrinsic evidence, its interpretation is still a matter of law for the court to decide. *Hartford Accident & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169, 172 (1973). Further, to the extent the

policy language is ambiguous, the ambiguity must be resolved in favor of the insured. *Tower Ins. Co. of New York v. Diaz*, 58 A.D.3d 495, 496 (1st Dep't 2009); *Garnar v. N.Y. Cent. Mut. Fire Ins. Co.*, 96 A.D.3d 715, 716 (2d Dep't 2012). This rule "is enforced even more strictly when the language at issue purports to limit the [insurance] company's liability." *Venigalia v. Penn. Mut. Ins. Co.*, 130 A.D.2d 974, 975 (4th Dep't 1987). As a result, to defeat summary judgment, the Insurer must show that its interpretation is the *only* reasonable and fair construction of the insurance policy. *Antoine v. City of New York*, 56 A.D.3d 583, 584-85 (2d Dep't 2008); *Vargas v. Ins. Co. of N. Am.*, 651 F.2d 838 (2d. Cir. 1981) (Under New York law, "an ambiguous provision in an insurance policy is construed most favorably to the insured and most strictly against the insurer" and the question on summary judgment is whether "the insurer's interpretation of the contract [is] the only reasonable and fair construction.").

II. The Policy Unambiguously Provides Coverage for the Insured's Loss of Business Income Caused by Loss of Utilities Due to Flooding

The Policy is made up of several forms, including the Business Income With Extra Expense form (Form 80-02-1101). That form provides Additional Coverage for Loss of Utilities. *See* Ex. A at 88-89; Ex. B at 2-3 (pages 8-9 of 18 of the Business Income with Extra Expense form). The Loss of Utilities provision initially states that it does not apply to damage caused by flood, but the policy's Flood Endorsement – which is controlling – ultimately deletes that language and restores coverage for flood damage. Although the Insurer might have chosen a more straightforward manner in which to accomplish this purpose, walking step by step through the various provisions in turn makes clear that the Policy does provide coverage for the Insured's business income loss resulting from loss of utilities caused by flood.

Step 1. We begin with the basic coverage. The Loss of Utilities coverage – which is part of the "Additional Coverages" section of the Policy – provides that the Insurer will pay for

business income loss "due to the actual impairment of [the Insured's] **operations** . . . caused by or result[ing] from direct physical loss or damage by a **covered peril** to: . . . **personal property of a utility** . . . necessary to supply your premises with" communication, power, or online access. Ex. A at 88-89; Ex. B at 2-3.

Step 2. At the end of the Loss of Utilities provision, the Policy states: "This Additional Coverage does not apply if the direct physical loss or damage is caused by or results from earthquake or **flood**." Ex. A at 89; Ex. B at 3. However, this exclusion is in turn *removed* by the Flood Endorsement. The Flood Endorsement (Form 80-02-1698) modifies the Loss of Utilities coverage in the Business Income With Extra Expense form by providing that "the Flood exclusion is deleted from the forms shown above." Ex. A at 223; Ex. B at 8. The "forms shown above" include Business Income With Extra Expense, which contains the Loss of Utilities coverage: thus coverage for Loss of Utilities caused by flooding is restored.

Step 3. The Flood Endorsement goes on to provide that the "[t]he Flood exclusion and any **flood** limitations are not deleted and remain in effect for . . . Loss of Utilities . . . *unless these Premises Coverage or Additional Coverages are shown in the Schedule above*." Ex. A at 223; Ex. B at 8 (emphasis added). As the Insurer acknowledged in its denial letter, Ex. D, and as the Policy in any event states, the "Schedule above" contains a list of forms, including specifically Business Income With Extra Expense, which – as described above – contains coverage for Loss of Utilities.

Thus, notwithstanding the convoluted manner in which it achieves this result, the Policy unambiguously provides that the Flood exclusion or limitation contained in the Business Income With Extra Expense coverage for Loss of Utilities *is* deleted and *does not* remain in

effect. Business income loss due to a loss of utilities caused by flooding is consequently covered by the Policy.

III. Even if the Court Concludes that the Policy's Language is Ambiguous, It Must Be Construed in Favor of the Insured

Even if the court finds that an ambiguity in the wording of an insurance policy exists, it must be resolved in favor of the insured and against the insurer. *Lavanant v. Gen. Acc. Ins. Co. of Am.*, 79 N.Y.2d 623, 629 (1992). In particular, any exclusion from coverage in an insurance policy must be narrowly construed and enforced only if the insurer can establish that the language cannot be interpreted in any other reasonable way. *Essex Ins. Co. v. Grande Stone Quarry, LLC*, 82 A.D.3d 1326, 1327 (3d Dep't 2011); *Raner v. Security Mutual Ins. Co.*, 102 A.D.3d 485, 486 (1st Dep't 2013).

As set forth in Point II above, the Insurer's assertion that business income coverage for loss of utilities caused by flooding is excluded cannot be the only reasonable interpretation – to the contrary, a systemic reading of the Policy reveals that this exclusion was rendered inapplicable by the language of the Flood Endorsement. If the Insurer wished to omit this coverage, it was required to use clear and unambiguous language to that effect, not bury the alleged (but in fact, non-existent) disclaimer in a series of deletions and reinsertions whose most logical reading provides *for* coverage. *See Vargas v. Ins. Co. of N. Am.*, 651 F.2d at 841 (insurer could have "defin[ed] the ... limits with more precision had [it] wished to preclude coverage," as "language to accomplish that objective was readily available"). Thus, even if the Court concludes that there is some ambiguity, summary judgment in the Insured's favor is still appropriate because the Insurer cannot establish that its interpretation is the only reasonable and fair construction of the Policy. *Antoine v. City of New York*, 56 A.D.3d at 584-85.

CONCLUSION

For the foregoing reasons, the Court should grant the Insured's motion for partial summary judgment and enter an order that the Policy provides the Insured with coverage for lost business income resulting from loss of utilities at the Insured's downtown New York offices, including loss of utilities caused by flooding.

Dated: New York, New York
January 31, 2014

Respectfully submitted,

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