

2016 WL 6916478 (N.Y.Sup.), 2016 N.Y. Slip Op. 32316(U) (Trial Order)
Supreme Court of New York.
New York County

****1** FIVE TOWNS NISSAN, LLC, Plaintiff,

v.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY, Tower
National Insurance Company, And PDP Group, Inc., Defendants.

No. 651164/2013.
November 22, 2016.

Decision and Order

Jeffrey K. Oing, J.

Mtn Seq. Nos. 010, 011, 012 & 013

Relief Sought

Mtn Seq. No. 010

***1** Defendant, Tower National Insurance Company (“Tower”), moves, pursuant to CPLR 3211(a)[7], for an order dismissing Count IV (declaratory judgment), Count VI (breach of the duty of good faith), and part of Count II (attorney's fees, costs and disbursements).

Mtn Seq. No. 011

Plaintiff, Five Towns Nissan, LLC (“Five Towns”), moves, pursuant to CPLR 3211(a)[7], or, in the alternative, pursuant to CPLR 3212, for an order dismissing Tower's counterclaim for reformation.

Mtn Seq. No. 012

Tower moves for summary judgment dismissing the complaint against it. Five Towns cross-moves for an order compelling disclosure from Tower.

****2 Mtn Seq. No. 013**

Five Towns moves, pursuant to CPLR 3025(b), for an order granting it leave to amend the complaint to add a cause of action against Tower based on General Business Law (“GBL”) § 349.

Tower cross-moves, pursuant to 22 NYCRR § 130-1.1, for costs and sanctions.

Factual and Procedural Background

Five Towns owns and operates an automobile dealership at 600 Burnside Avenue in Inwood, New York, that suffered losses from Super-storm Sandy on October 29, 2012. Its losses include damages to its facilities and disruption of its business operations. Five Towns had an insurance policy with Tower to insure against property damage and business income loss, covering the period from July 1, 2012 through July 1, 2013 (the “policy”). The policy provides coverage for, among other things, property damage and business interruption. Five Towns claims that Tower wrongfully denied coverage for both categories of its losses, property damage and business income, based on the water exclusion clause contained in the policy.

The water exclusion clause at issue provides the following:

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or **3 event that contributes concurrently or in any sequence of the loss.

* * *

g. Water

(1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not.

(Buckley Affirm., 9/28/15, Ex. 1, Appendix, at A-230).

In a prior decision and order, I granted Five Towns' motion for partial summary judgment against Tower with respect to its claim for business interruption loss by finding that water exclusion was inapplicable to the business interruption coverage (NYSCEF Doc. No. 162). The Appellate Division, First Department reversed and granted partial summary judgment to Tower:

As there is no issue as to the application of the policy terms excluding losses due to the flooding that plaintiff claims, we grant partial summary judgment to defendant insurance company and make a declaration of no coverage.

(*Five Towns Nissan, LLC v Universal Underwriters Insurance Co.*, 125 AD3d 580 [1st Dept 2015]). The Appellate Division “declared that the subject policy's flood exclusion bars coverage for [Five Towns'] loss of business income and extra expense” (*Id.*).

Five Towns moved to reargue the Appellate Division's decision and for leave to appeal. In its brief in support of reargument and for leave to appeal, Five Towns argued that the **4 Appellate Division should grant reargument and vacate that portion of its ruling which essentially found that the policy's flood exclusion includes Super-storm Sandy's storm surge (Buckley Affirm., 9/28/15, Ex. 8, at 11). In that regard, Five Towns argued the following:

*2 This Court reversed the trial court's summary judgment ruling by Decision and Order dated February 26, 2015 (hereinafter, “February 26 Ruling”). The Court held Tower's Flood Exclusion applies to its Business Interruption coverage, and the Court *sua sponte* granted Tower summary judgment on this issue. Tower, however, argues this Court went further and, through the following sentence, closed the door completely on Five Towns' Business Interruption coverage claim arising from Sandy's storm surge.

It is declared that the subject policy's, flood exclusion bars coverage for plaintiff's loss of business income and extra expense.

If Tower correctly interprets the February 26 Ruling, then this Court resolved -- as a matter of law, on an empty record, with no discovery or even argument of counsel -- the first impression issue in this State of whether an insurer's flood exclusion encompasses Sandy's storm surge.

Five Towns respectfully asks this Court to grant its reargument motion and: (1) vacate its purported ruling on the flood v. storm surge issue or, in the alternative, grant Five Towns leave to appeal this ruling; and (2) reverse its ruling that Tower's Flood Exclusion applies to its Business Interruption coverage or, in the alternative, grant Five Towns leave to appeal this ruling.

(Buckley Affirm., 9/28/15, Ex. 8, pp. 9-10). The Appellate Division denied Five Towns' motion to reargue and for leave to ****5** appeal (*Five Towns Nissan, LLC v Universal Underwriters Ins. Co.*, 2015 NY Slip Op 81273(U) [1st Dept 2015]).

Discussion

Five Towns' remaining claims against Tower are for property damage. In its summary judgment motion, Tower argues that as a result of the Appellate Division's decision finding that the flood exclusion applies to Five Towns' business income claims, the property damage claims should necessarily also be dismissed because they are based on the same Super-storm Sandy water event.

In opposition, Five Towns argues that the flood exclusion does not include the Sandy-related storm surge that caused its property damage. Five Towns further argues that neither this Court nor the Appellate Division considered or ruled on the issue of whether a storm surge is a flood.

Contrary to Five Towns' argument, the Appellate Division clearly considered its argument that Sandy's storm surge does not fall within the water exclusion, and implicitly rejected that argument. In fact, the Appellate Division not only reversed this Court's finding in favor of Five Towns, but also searched the record and *sua sponte* granted Tower partial summary judgment declaring that “the policy's flood exclusion bars coverage for - [Five Towns'] loss of business income” (*Five Towns Nissan, LLC v Universal Underwriters Ins. Co.*, 125 AD3d 580 [1st Dept 2015]). ****6** As such, the Appellate Division found that the water resulting from Super-storm Sandy, and Five Towns' resulting damages, falls within the purview of the policy's flood exclusion. Thus, the Appellate Division decision granting Tower summary judgment, and its subsequent denial of Five Towns' motion to reargue, is law of the case, namely, that the flood exclusion excludes the Super-storm Sandy water event that caused Five Towns' property damage (*Board of Managers of the 25 Charles St. Condo. v Seligson*, 106 AD3d 130 [1st Dept 2013] [“[A]ppellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court”] [internal quotation marks omitted]). Any finding to the contrary concerning property damage coverage would be at odds with the Appellate Division's declaration that the Super-storm Sandy water event causing loss of business income is barred by the policy's flood exclusion.

***3** Accordingly, Tower's motion for summary judgment (mtn seq. no. 012) is granted, and the remaining property damage claims are hereby dismissed. Five Towns' cross-motion to compel discovery is denied.

In light of this determination, Tower's motion to dismiss (mtn seq. no. 010) is denied as moot.

Five Towns' motion to dismiss Tower's counterclaim for reformation (mtn seq. no. 011) is granted, and the counterclaim ****7** is dismissed. Tower's counterclaim seeks “reformation of the Tower Policy as necessary to express the parties' agreement, understanding, and mutual intent that the Tower Policy does not provide Business Income Coverage for losses, caused by ‘Flood,’ as that term is defined in the Tower Policy” (Thomas Affirm., 11/4/14, Ex. F). Given the Appellate Division's declaration that the “policy's flood exclusion bars coverage for plaintiff's loss of business income

and extra expense,” (*Five Towns Nissan, LLC*, 125 AD3d 580), and this Court's finding herein, the counterclaim is no longer a justiciable controversy.

Five Towns moves for leave to amend the complaint (mtn seq. no. 013) to add a cause of action against Tower based on GBL § 349. Tower cross-moves for the imposition of costs and sanctions.

In support of this motion, Five Towns claims that Tower purposely sold it an ambiguous policy that omitted the following language:

Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (*including storm surge*) ...

Five Towns claims that the insurance industry realized the deficiencies in the pre-Hurricane Katrina flood exclusion. Thus, in 2011, the Insurance Services Office (“ISO”) revised its Causes **8 of Loss-Special Form, the same form Tower used in the policy it sold to Five Towns, to include the above quoted language. Five Towns contends that Tower purposely sold it a policy without the storm surge language, and that the Tower flood exclusion did not define the term flood, nor did it exclude the risk of storm surge.

The elements of a claim under GBL § 349 are: “(1) the challenged transaction was ‘consumer-oriented’; (2) defendant engaged in deceptive or materially misleading acts or practices; and (3) plaintiff was injured by reason of defendant's deceptive or misleading conduct” (*Denenberg v Rosen*, 71 AD3d 187 [1st Dept 2010]). The allegations in support of Five Towns' proposed cause of action for violation of GBL § 349 include:

Tower knowingly, recklessly and wantonly sold a Policy to plaintiff that did not specifically exclude storm surge coverage. Tower's conduct likely would mislead a reasonable consumer, acting reasonably under the circumstances, into believing its policy covered the risk of loss due to storm surge.

(Alfano Affirm., 10/27/15, Ex. J).

While leave to amend will be granted upon a showing that the proposed “amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Insurance Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]), given the procedural history of this case, the proposed new claim is devoid of merit. The **9 Appellate Division decision provided that “there is no issue as to the application of the policy terms excluding losses due to the flooding that plaintiff claims” (*Five Towns Nissan, LLC*, 125 AD3d 580). In any event, this Court is not persuaded by Five Towns' conclusory allegation that it was misled into purchasing a policy that omitted the storm surge term from the water exclusion.

*4 Accordingly, Five Towns' motion to amend is denied. Tower's cross-motion, for sanctions and costs is also denied. The record does not support such an award.

Accordingly, it is hereby

ORDERED that Tower's motion for summary judgment dismissing the complaint against it (mtn seq. no. 012) is granted, and the complaint is hereby dismissed; and it is further

ORDERED that Five Towns' cross-motion to compel is denied as moot; and it is further

ORDERED that Tower's motion to dismiss Count IV, Count VI, and part of Count II (mtn seq. no. 010) is denied as moot; and it is further

ORDERED that Five Towns' motion for summary judgment dismissing Tower's counterclaim for reformation (mtn seq. no. 011) is granted, and it is dismissed; and it is further

****10** ORDERED that Five Towns' motion to amend the complaint (mtn seq. no. 013) is denied; and it is further

ORDERED that Tower's cross-motion for sanctions and costs is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/22/16

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HON. JEFFREY K. OING, J.S.C.

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