

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ALMAH LLC, a Delaware limited)	
liability corporation and SL GREEN)	
REALTY CORPORATION, a Maryland)	
corporation,)	C.A. No.: N15C-01-237 EMD
)	
Plaintiffs,)	
)	TRIAL BY JURY OF TEWLVE
v.)	DEMANDED
)	
LEXINGTON INSURANCE)	
COMPANY, a Delaware corporation,)	
)	
Defendant.)	

Submitted: October 19, 2015
Decided: January 27, 2016

Upon Consideration of Plaintiffs’ Motion for Judgment on the Pleadings
DENIED as relating to TIME ELEMENT losses
Upon Consideration of Defendant’s Motion for Summary Judgment
GRANTED as relating to TIME ELEMENT losses

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DAVIS, J.

INTRODUCTION

This is a civil action regarding coverage under a commercial insurance policy (the “Policy”).¹ Plaintiffs Almah LLC (“Almah”) and SL Green Realty Corporation (“SL Green”) (collectively, “Plaintiffs”) brought suit against Defendant Lexington Insurance Company

¹ The Policy is more specifically identified in the pleadings as Commercial Property Policy No. 004272097 for the period December 31, 2011 to December 31, 2012. Terms in all capital letters are terms used that way in the Policy itself. For example, the Policy sets out that the term “time element” is TIME ELEMENT throughout the Policy and is, thus a defined term in the Policy.

(“Lexington”) for Lexington’s purported failure to indemnify Plaintiffs under the Policy for certain losses sustained as a result of Superstorm Sandy.

The Policy provides coverage in the event of an occurrence at, among other places, Plaintiffs’ property located at 180 Maiden Lane in New York (the “Property”). Superstorm Sandy damaged the Property in October 2012. Pursuant to the terms of the Policy, Lexington paid Plaintiffs \$26,342,392 for wind and flood damages. Plaintiffs allege that they are entitled to a further \$15,804,504 for non-physical damages and losses. The issue in this action is whether the Limit of Liability for flood damage (the “Flood Sub-limit”) applies to Plaintiffs’ claims for non-physical damages and losses, like expediting costs, service interruption time element loss, on-premise service coverage debris removal, demolition and increased costs of construction, and professional or loss adjustment fees.

Plaintiffs filed the Complaint for Breach of Contract (the “Complaint”) on January 30, 2015, alleging that Lexington breached the Policy by refusing to pay for the non-physical damages and losses caused by Superstorm Sandy. Plaintiffs filed Plaintiffs Almah LLC and SL Green Realty Corporation’s Motion for Judgment on the Pleadings and Plaintiffs’ Opening Brief in Support of Their Motion for Judgment on the Pleadings (collectively, “Plaintiffs’ Motion”) on May 6, 2015 and May 7, 2015.² Plaintiffs contend that the Flood Sub-limit in the Policy only applies to physical loss or damages from a FLOOD and not to the non-physical damages and losses claims that Plaintiffs made under the Policy.

Lexington filed Defendant’s Motion for Summary Judgment and Defendant’s Brief in Opposition to Plaintiffs’ Motion for Judgment on the Pleadings and in Support of Defendant’s Motion for Summary Judgment (collectively, “Lexington’s Response and Motion”) on June 15,

² Plaintiffs filed Plaintiffs Almah LLC and SL Green Realty Corporation’s Motion for Judgment on the Pleadings on May 6, 2015. Plaintiffs filed Plaintiffs’ Opening Brief in Support of Their Motion for Judgment on the Pleadings, along with Plaintiffs’ Motion to Extend the Page Limit, on May 7, 2015.

2015. Lexington contends that by paying the Flood Sub-limit of \$25,000,000 and additional money for wind damage, it fulfilled its duties under the Policy.

Plaintiffs filed Plaintiffs' Brief in Further Support of Their Motion for Judgment on the Pleadings and in Opposition to Defendant's Motion for Summary Judgment ("Plaintiffs' Reply and Response") on July 15, 2015. Lexington filed Defendant Lexington Insurance Company's Reply Brief in Further Support of Its Motion for Summary Judgment ("Lexington's Reply") on July 30, 2015.

On October 19, 2015, the Court held a hearing on the Plaintiffs' Motion, Lexington's Response and Motion, Plaintiffs' Reply and Response, and Lexington's Reply. At the conclusion, the Court took the matter under advisement. This is the Court's decision on the pending motions. For the reasons set forth below, the Court will **DENY** Plaintiffs' Motion and **GRANT** Lexington's Response and Motion as those motions relate to TIME ELEMENT losses.

RELEVANT FACTS

Almah owns the Property.³ SL Green is the first named insured under the Policy.⁴ The Property is a building in New York City, which Plaintiffs leased to businesses, including AIG and Stroock & Stroock & Lavan LLP.⁵ Superstorm Sandy damaged the Property in October 2012.⁶ As a result, there was physical damage to the building and to equipment in the building.⁷ There were also repair costs and business losses.⁸

³ Complaint for Breach of Contract ¶ 36.

⁴ *Id.* ¶ 10.

⁵ *Id.* ¶ 38.

⁶ *Id.* ¶ 35.

⁷ *Id.* ¶¶ 35, 39-40.

⁸ *Id.* ¶¶ 42-48, 54.

In this action, there are no disputes about the losses themselves, or the cause of the losses, from Superstorm Sandy.⁹ Further, the parties do not dispute that the Policy states that the limit of liability for a flood is \$25,000,000.¹⁰ They also agree that the Policy’s use of “flood” includes flooding from Superstorm Sandy.¹¹

As the Property’s insurer, Lexington paid Plaintiffs \$1,342,392 for wind damages in a settlement and \$25,000,000 for flood damages, the amount set in the policy limit.¹² The \$25,000,000 did not cover all of the expenses that Plaintiffs incurred in repairing the insured property.¹³

Plaintiffs allege that they are entitled to a further \$15,804,504 for non-physical damages and losses under the terms of the Policy.¹⁴ The non-physical damages and losses include:

- The cost of bringing in water pumps to drain the Property and building a temporary electrical room
- The cost of removing debris and contaminated property
- The cost of hiring adjusters, architects, and engineers to inspect the Property and prepare building surveys
- The rental loss for the time when the building was not habitable
- The rental loss and rent abatements caused by the lack of voice, data, or video services and by the physical loss or damage to the voice and data equipment
- The demolition and re-building of portions of the building to comply with laws or ordinances¹⁵

⁹ Defendant’s Brief in Opposition to Plaintiffs’ Motion for Judgment on the Pleadings and in Support of Defendant’s Motion for Summary Judgment at 5 [hereafter Def. Br.].

¹⁰ Plaintiffs’ Opening Brief in Support of Their Motion for Judgment on the Pleadings, Exhibit A, Declarations-Section A ¶ 8 [hereafter Pl. Br.].

¹¹ *Id.*, Exhibit A, Property Damage – Section B.3.N.

¹² Complaint for Breach of Contract ¶ 56; Pl. Br. at 8.

¹³ Complaint for Breach of Contract ¶ 56.

¹⁴ *Id.* ¶ 69.

¹⁵ *Id.* ¶ 61.

Plaintiffs contend that the Flood Sub-limit from Limits of Liability only applies to the physical damages and losses, not to these non-physical damages and losses.¹⁶ Lexington contends that Flood Sub-limit applies to all damages and losses, whether physical or non-physical, caused by the flood.

The Policy provides the following Limits of Liability provision:

8. LIMITS OF LIABILITY

* * *

B. limits of liability in an Occurrence apply to the total loss or damage at all Locations and for all coverages involved, including any insured TIME ELEMENT loss, subject to the following provisions:

- 1) when a limit of liability applies in the Aggregate During Any Policy Year, the Company's maximum amount payable will not exceed such limit of liability during any policy year regardless of the number of Locations, coverages or Occurrences involved.
- 2) when a limit of liability applies to a Location or other specified property, such limit of liability will be the maximum amount payable for all loss or damage at all Locations arising from physical loss or damage at such Location or to such other specified property.

* * *

Limits of Liability

* * *

USD 100,000,000 FLOOD in the Annual Aggregate During Any Policy Year except;

* * *

USD 25,000,000 Annual Aggregate During the Policy year as respects to 4 locations Special Hazard Flood Areas, areas of 100- Year Flooding,

¹⁶ Pl. Br. at 1.

as defined by the Federal Emergency Management.¹⁷

The Policy provides for a definition of “Flood.” As set forth in the Policy, “Flood” is defined as follows:

N. FLOOD

This Policy covers physical loss or damage caused by or resulting from Flood.

1) References and Application. The following term(s) wherever used in this Policy means:

a) Flood:

Flood; surface waters; rising waters; storm surge, sea surge, wave wash; waves; tsunami; tide or tidal water; the release of water, the rising, overflowing or breaking of boundaries of natural or man-made bodies of water; or the spray therefrom; all whether driven by wind or not; or sewer back-up resulting from any of the foregoing; regardless of any other cause or event, whether natural or man-made, contributing concurrently or in any other sequence of loss. Physical loss or damage from Flood associated with a storm or weather disturbance whether or not identified by name by the U.S. National Hurricane Center or any other meteorological authority, such as the Tokyo Typhoon Center or the Central Pacific Hurricane Center, is considered to be Flood within the terms of this Policy. However, physical loss or damage by fire, explosion or sprinkler leakage resulting from Flood is not considered to be loss by Flood within the terms and conditions of this Policy.¹⁸

The Policy also provides coverage for loss or damage to property under various Additional Coverages with separate delineated sub-limits. These are set out in the ADDITIONAL COVERAGES subsection of the PROPERTY DAMAGE section of the Policy.¹⁹

¹⁷ Pl. Br. at Exhibit A, Declarations – Section A.8.

¹⁸ Pl. Br. at Exhibit A, Property Damage – Section B.3.N.

¹⁹ *Id.* at Exhibit A, Property Damage – Section B.3.A-X.

LEGAL STANDARD

1. CIVIL RULE 12(C)

A party may move for judgment on the pleadings pursuant to Civil Rule 12(c).²⁰ In determining a motion under Civil Rule 12(c) for judgment on the pleadings, the Court is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party.²¹ The Court must take the well-pleaded facts alleged in the complaint as admitted.²² When considering a motion under Civil Rule 12(c), the Court also assumes the truthfulness of all well-plead allegations of fact in the complaint.²³ The Court must, therefore, accord plaintiffs opposing a Rule 12(c) motion the same benefits as a plaintiff defending a motion under Civil Rule 12(b)(6).²⁴ The Court may grant a motion for judgment on the pleadings only when no material issue of fact exists and the movant is entitled to judgment as a matter of law.²⁵

2. CIVIL RULE 56

The standard of review on a motion for summary judgment is well-settled. The Court's principal function when considering a motion for summary judgment is to examine the record to

²⁰ Civil Rule 12(c) provides:

Motion for judgment on the pleadings. -- After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Del. Super. Civ. R. 12(c).

²¹ See *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993); see also *Warner Commc'ns, Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 965 (Del. Super.), *aff'd without opinion*, 567 A.2d 419 (Del. 1989).

²² See *Desert Equities, Inc.*, 624 A.2d at 1205; *Warner Commc'ns, Inc.*, 583 A.2d at 965.

²³ See *McMillan*, 768 A.2d at 500.

²⁴ *Id.*

²⁵ See *Desert Equities, Inc.*, 624 A.2d at 1205; *Warner Commc'ns, Inc.*, 583 A.2d at 965.

determine whether genuine issues of material fact exist, “but not to decide such issues.”²⁶

Summary judgment will be granted if, after viewing the record in a light most favorable to a non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.²⁷ If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.²⁸ The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.²⁹ If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for the resolution by the ultimate fact-finder.³⁰

Whether under Civil Rule 12(c) or Civil Rule 56, the parties made it clear to the Court that they did not believe there were any genuine issues as to any material facts and that one of the parties, Plaintiffs or Lexington, was entitled to judgment as a matter of law.

DISCUSSION

The parties already agree that the Policy covers physical damages and losses from the Superstorm Sandy flood. Lexington paid Plaintiffs \$25,000,000 for those damages. The issue is whether the Flood Sub-limit applies to certain non-physical damages and losses claimed by Plaintiffs. These claims are valued by Plaintiffs at \$15,804,504.

²⁶ *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

²⁷ *Id.*

²⁸ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *see also Cook v. City of Harrington*, 1990 WL 35244 at *3 (Del. Super. Feb. 22, 1990) (citing *Ebersole*, 180 A.2d at 467) (“Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.”).

²⁹ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (citing *Ebersole*, 180 A.2d at 470).

³⁰ *See Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).

The parties both contend that New York law governs the Policy.³¹ The Court does not need to decide what law to apply because there is not a true conflict of laws.³² Delaware, Maryland, Massachusetts, and New York all have some type of relationship with the parties in this civil action.³³ Under Delaware, Maryland, Massachusetts, and New York law, insurance policies are contracts, and contract interpretation is a matter of law.³⁴ A court may interpret an unambiguous contract as a matter of law by giving clear and unambiguous terms their plain and ordinary meaning.³⁵ An ambiguity exists where a term has more than one interpretation.³⁶ There is no true conflict between the laws of Delaware, Maryland, Massachusetts, and New York for the interpretation of an insurance policy. Therefore, this Court does not need to conduct a choice of law analysis to render its decision on the outstanding motions.

After reviewing the Policy, the various briefs from the parties, and oral argument, the Court finds and holds that the Policy is not ambiguous. As such, the Court may interpret the Policy as a matter of law based on its plain and ordinary meaning.

The Policy addresses the non-physical damages and losses at issue in this action in PROPERTY DAMAGE – SECTION B and TIME ELEMENT – SECTION C of the Policy. The

³¹ Pl. Br. at 2; Def. Br. at 6.

³² When there is no choice of law provision, Delaware courts conduct an analysis under the Restatement (Second) Conflicts of Laws to determine the applicable law. *Deuley v. DynCorp. Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010). If there is a true conflict of law, Delaware courts apply a most significant relationship test as set forth in Restatement (Second) Conflict of Laws § 188. *Liggett Grp. V. Affiliated FM Ins. Co.*, 788 A.2d 134, 137 (Del. Super. 2001). New York appears to have the most significant relationship with the issues in this civil action. Accordingly, if there were a true conflict, this Court would utilize New York law to resolve any disputes.

³³ Lexington and Almah are organized as a corporation and a limited liability corporation, respectively, under Delaware law. Complaint for Breach of Contract ¶¶ 5, 7. Delaware is also the forum state. SL Green is organized as a corporation under Maryland law. *Id.* ¶ 6. Lexington has its principal place of business in Massachusetts. *Id.* ¶ 7. SL Green and Almah have their principal places of business in New York. *Id.* ¶ 5-6. Most importantly, the Property is in New York. *Id.* ¶ 4.

³⁴ *Dream Spa, Inc. v. Fireman's Fund Ins.*, No. 06-CV-13142, 2008 WL 355458, at *4 (S.D.N.Y. Feb. 6, 2008); *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001); *Cole v. State Farm Mut. Ins. Co.*, 753 A.2d 533, 537 (Md. 2000); *Boazova v. Safety Ins. Co.*, 968 N.E.2d 385, 390 (Mass. 2012).

³⁵ *O'Brien*, 785 A.2d at 288; *Cole*, 753 A.2d at 537; *Boazova*, 968 N.E.2d at 390; *Seaport Park Condo. v. Greater N.Y. Mut. Ins. Co.*, 39 A.D.3d 51, 54 (N.Y. App. Div. 2007).

³⁶ *Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 275-76 (2d Cir. 2000); *O'Brien*, 785 A.2d at 288; *Cole*, 753 A.2d at 537; *Bank v. Thermo Elemental Inc.*, 888 N.E.2d 897, 907 (Mass. 2008).

Policy sets forth the limitations of liability for damages and losses in DECLARATIONS – SECTION A.8. LIMITS OF LIABILITY. Using these provisions of the Policy, the Court can determine which of Plaintiffs’ claims are subject to the \$25,000,000 limit of liability for FLOOD and which of Plaintiffs’ claims would not be subject to the \$25,000,000 limit of liability for FLOOD. Plaintiffs’ claims that are not subject to the \$25,000,000 limit for liability for FLOOD may have their own treatment under the Policy depending on how the claim arose.

“Property Damage – Section B” identifies covered property damages, including items like DEBRIS REMOVAL and FLOOD.³⁷ It further states “these Additional Coverages are subject to the applicable limit of liability . . . all as shown in this section and elsewhere in this Policy.”³⁸ Here, the “applicable limit of liability” is set out in DECLARATIONS – SECTION A.8 LIMITS OF LIABILITY. Therefore, any claims made under this section are subject to the applicable limit of liability. The applicable limit of liability for FLOOD here is the Flood Sub-limit of \$25,000,000.³⁹ The applicable limit of liability, for example, for DEBRIS REMOVAL is \$5,000,000 or 25% of the loss, whichever is greater.⁴⁰

The Court notes that there is no separate line item or limit of liability for TIME ELEMENT loss. That is because the Policy specifically provides that any TIME ELEMENT loss is included in the limits of liability related to an OCCURRENCE. The Policy provides:

- B. limits of liability in an Occurrence apply to the total loss or damage at all Locations and for all coverages involved, ***including any insured TIME ELEMENT loss***, subject to the following provisions:

* * *

³⁷ Pl, Br., Exhibit A, Property Damage – Section B.3.G and Section B.3.N.

³⁸ *Id.*

³⁹ *Id.* Exhibit A, Declarations – Section A.8.

⁴⁰ *Id.*

3. when a limit of liability applies to a Location or other specified property, such limit of liability will be the maximum amount payable for all loss or damage at all Locations arising from physical loss or damage at such Location or to such other specified property.⁴¹

This is further supported by that part of the Policy that deals with TIME ELEMENT losses. TIME ELEMENT – SECTION C identifies covered time element damages, including extra expenses like loss of business income, service interruption expenses, extended period of liability expenses, and rental insurance extended period of liability expenses.⁴² TIME ELEMENT – SECTION C states that time element losses are “subject to the applicable limit of liability that applies to the insured physical loss or damage.”⁴³ Again, this clearly means any TIME ELEMENT claims made under this section are subject to the applicable limit of liability that applies to the insured physical loss or damage – *e.g.*, the Flood Sub-limit of \$25,000,000 for FLOOD or the limit of \$5,000,000 for DEBRIS REMOVAL.

The Court finds and holds that the Flood Sub-limit applies to many of Plaintiffs’ claims arising from the Superstorm Sandy flood.⁴⁴ The plain language of the Policy provides that the \$25,000,000 coverage for FLOOD in an “area[] of 100-Year Flooding, as defined by the Federal Emergency Management” (i.e., the Property) is for total loss or damage including any insured TIME ELEMENT loss. Therefore, any claim by Plaintiffs that arises out of TIME ELEMENT – SECTION C falls within the \$25,000,000 limit of liability for FLOOD.

Making this distinction may not be as easy as Lexington contends. Plaintiffs’ other claims must be addressed on an item-by-item basis. The parties should be able to do this by applying the plain language of the Policy. For example, Plaintiffs’ claim for “Debris Removal”,

⁴¹ *Id.*

⁴² *Id.*, Exhibit A, Time Element – Section C.1 and C.2 ¶¶ 19, 21-25.

⁴³ *Id.*, Exhibit A, Time Element – Section C.

⁴⁴ *See, e.g.*, Complaint for Breach of Contract ¶¶ 19, 21-25.

if made under PROPERTY DAMAGE – SECTION B.3.G DEBRIS REMOVAL, would be a separate claim subject to its applicable limitation of liability – which in this case is \$5,000,000.

CONCLUSION

For the foregoing reasons, Plaintiffs’ Motion for Judgment on the Pleadings is **DENIED** and Defendant’s Motion for Summary Judgment is **GRANTED** as those motions relate to TIME ELEMENT losses. The Court will contact the parties to schedule a status conference to address issues relating to Plaintiffs’ claims that do not relate to TIME ELEMENT losses.

IT IS SO ORDERED.

/s/ Eric M. Davis

Eric M. Davis, Judge