

Rick Friedman Enters., Ltd. v Travelers Indem. Co.

2017 NY Slip Op 31491(U)

June 27, 2017

Supreme Court, New York County

Docket Number: 652949/13

Judge: Gerald Lebovits

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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7**

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RICK FRIEDMAN ENTERPRISES, LTD. d/b/a
ARTVALE,

Plaintiff,

Index No.: 652949/13

DECISION/ORDER

-against-

THE TRAVELERS INDEMNITY COMPANY,
INTERMARKET INSURANCE AGENCY, INC. and
8TH STREET PASSAIC, LLC,

Defendants.

-----X
Gerald Lebovits, J.

In this commercial insurance action, defendant the Travelers Indemnity Company (Travelers) moves for summary judgment to dismiss the complaint as against it (motion sequence number 004). For the following reasons, this motion is granted.

BACKGROUND

Plaintiff Rick Friedman Enterprises, Ltd. d/b/a Artvale (Artvale) is a New York corporation engaged in the business of wholesale fabric and textile sales. *See* notice of motion, McHugh affirmation, exhibit 4 (complaint), ¶ 1. Intermarket is Artvale's insurance broker, and codefendant Travelers is Artvale's insurer. *Id.*, ¶¶ 2-3. Codefendant 8th Street Passaic, LLC (8th Street) is the owner of a commercial warehouse, located at 100 8th Street in Passaic, New Jersey (the Passaic warehouse), in which Artvale had stored a portion of its inventory. *Id.*, ¶ 4. This action arises out of a flood in the Passaic warehouse that occurred on August 27, 2011, because of Hurricane Irene, which caused damage to Artvale's inventory. *Id.*, ¶ 15. Artvale has since discontinued this action as against 8th Street.

This action involves an insurance claim that Artvale submitted to Travelers, and that Travelers subsequently rejected, for damage to certain of Artvale's inventory that occurred on August 27, 2011, because of Hurricane Irene. Prior to that occurrence, Travelers had issued a commercial insurance policy (the policy) to Artvale, providing coverage for the period from November 14, 2010, to November 14, 2011. *See* notice of motion, Coffin aff, ¶ 2; exhibit 1. The relevant portion of the policy provides, as follows:

"Causes of Loss - Special Form

"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 event that contributes concurrently or in any sequence to 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;
- “(2) Mudslide or mudflow;
- “(3) Water or sewage that backs up or overflows from a sewer, drain or sump; or
- “(4) Water on the ground surface pressing on, or flowing or seeping through:
 - (a) foundations, walls, floors or paved surfaces;
 - (b) basements, whether paved or not; or
 - (c) doors, windows or other openings;

“all whether naturally occurring or due to man-made or other artificial causes.

“But if water . . . results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.”

Id., exhibit 1. Before Hurricane Irene, Artvale had maintained a store of its inventory at a warehouse in Roselle, New Jersey. *Id.*, McHugh affirmation, ¶ 2. On August 1, 2011, Artvale authorized its warehouse manager, nonparty Service Distributors, LLC (Service), to move this inventory to the Passaic warehouse. *Id.* At that time, Artvale instructed its insurance broker, Intermarket, to contact Travelers to amend the policy to include the Passaic warehouse as a “covered location.” *Id.*, ¶ 3. Travelers did so on that date. *Id.*, ¶ 4. Flooding from Hurricane Irene caused damage to the subject inventory in the Passaic warehouse on August 27, 2011. Artvale submitted an insurance claim for that loss to Travelers on August 29, 2011. *Id.*, Coffin aff, ¶ 4. Travelers’ claims adjustor Dwight Carter inspected the Passaic warehouse on September 13 and 20, 2011. *Id.*, ¶¶ 6-8.

On October 18, 2011, Travelers formally disclaimed coverage for Artvale’s claim in a letter that stated, in pertinent part, as follows:

“We refer you to the following applicable policy language from the CPT108 (01/03) Causes of Special Loss Form which states in relevant part:

‘A. Covered Causes of Loss

When special loss is shown in the Declarations, Covered Causes of Loss means Risks of Direct Physical Loss unless the loss is:

- 1. Excluded in Section B, Exclusions; or

2. Limited in Section C, Limitations; that follow

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 event that contributes concurrently or in any sequence to 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;
- (2) mudslide or mudflow;
- (3) Water or sewage that backs up or overflows from a sewer, drain or sump; or
- (4) Water under the ground surface pressing on, or flowing or seeping through:
- (a) foundations, walls, floors or paved surfaces;
- (b) basements, whether paved or not; or
- (c) doors windows or other openings;

All whether naturally occurring or due to man made or other artificial causes.

But if Water, as described in g (1) through g (4) above results in fire, explosion or sprinkler leakage, we will pay for the damage caused by that fire, explosion or sprinkler leakage

C. Limitations

Damage to the interior of a building or structure or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not unless:

- (1) the building or structure first sustains damage by a Covered Cause of Loss to its roof and walls through which the rain enters.

“The claimed water damage is excluded by the above quoted language. Unfortunately, the policy does not cover this loss. Please accept our assurances that we have given due consideration for this claim. We regret that we cannot be

of assistance.”

Id., ¶ 10. Artvale thereafter commenced this action on August 20, 2013. *Id.*, exhibit 4.

In support of its motion, Travelers submits a copy of the Examination before trial (EBT) testimony of Service partner Karl Feaster, who inspected the Passaic warehouse immediately after Hurricane Irene, and noted a two and one-half foot-high water mark on the walls inside the building, along with a large quantity of mud and debris. *See* notice of motion, McHugh affirmation, exhibit 5. Travelers also presents a copy of the EBT testimony of Artvale president and owner Rick Friedman, who also inspected the Passaic warehouse immediately after Hurricane Irene, and made the same observations as Feaster. *Id.*, exhibit 6. Finally, Travelers submits an affidavit from claims manager Brian Coffin, Carter’s supervisor, who explains that Travelers’ second inspection of the Passaic warehouse was done in response to Artvale’s suggestion that high winds from Hurricane Irene might have damaged the warehouse’s roof, thereby causing rainwater to enter the building and damage the inventory. *Id.*, Coffin aff, ¶ 8. Coffin states that the inspection disclosed no roof damage to the Passaic warehouse, and submits the photographs of the roof that Carter took during that inspection to bear out that conclusion. *Id.*, ¶ 10; exhibits 2, 3.

In opposition to Travelers’ motion, Artvale contends that there was damage to the vent covers that protected the ceiling fans in the Passaic warehouse’s roof, which resulted in leaks from the vents when it rained. *See* Monaenkova affirmation in opposition, ¶ 7. Artvale notes that Feaster was unable to discount the possibility that high winds, rain from Hurricane Irene, and roof leaks permitting the entry of rain water, might have been a secondary cause of the damage to Artvale’s inventory, along with the flood water and sewer backup. *Id.*, ¶ 7; exhibit C. Artvale next presents an affidavit and photographs from Friedman stating that, when he inspected the Passaic warehouse after hurricane Irene, he observed that some vent covers had apparently been blown off the warehouse’s roof. *Id.*, exhibits A, B. Finally, Artvale presents an affidavit from consulting meteorologist Howard Altschule, who states that Hurricane Irene caused several days of heavy wind and rain, but, nonetheless, opines that the rainfall was not of a sufficient volume to cause flooding on August 27, 2011. *Id.*, exhibit D.

In reply to Artvale’s opposition, Travelers submits copies of the same United States Geological Survey (USGS) data that Altschule reviewed, and notes that it indicates that, while the Passaic River did not reach flood stage on August 27, 2011, it continued to rise for the next three days and eventually crested at 14.19 feet on August 30, 2011. *See* McHugh reply affirmation, ¶ 25; exhibits 1, 3, 4, 6, 7, 8. Travelers also notes that it was Friedman who reported August 27, 2011, as the date of loss on Artvale’s claim form, and that Friedman himself testified that he was unable to enter or inspect the Passaic warehouse until September 2, 2011. *Id.*, ¶¶ 9-12, 19-21; exhibit 2. Travelers finally notes that Feaster testified that he entered and inspected the Passaic warehouse on September 1, 2011, and that he observed flood damage and a two-and-one-half foot-high water mark on the warehouse’s interior walls. *Id.*, ¶¶ 16, 28-30; exhibit 5.

Artvale commenced this action on August 20, 2013, by filing a summons and complaint

with causes of action for: 1) breach of contract (against Travelers); 2) negligence (against Intermarket); 3) breach of fiduciary duty (against Intermarket); 4) breach of contract (against 8th Street); and 5) negligence (against 8th Street). See notice of motion, McHugh affirmation, exhibit 4 (complaint). As was mentioned earlier, Travelers filed an answer on December 23, 2013, and Artvale thereafter discontinued this action as against 8th Street. Now before the court is Travelers' motion for summary judgment to dismiss the complaint as against it (motion sequence number 004).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003).

Artvale's sole cause of action against Travelers sounds in breach of contract. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. See e.g. *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). Travelers argues that Artvale's breach of contract claim must be dismissed: Artvale cannot establish that Travelers breached the policy because property loss that results from flood damage is explicitly excluded from coverage.

Travelers raises a two-part argument in support of its motion. First, Travelers argues that "the policy does not provide coverage for concurrent losses." See defendant's mem of law at 11-12. Next, Travelers argues that "the water damage exclusion clearly applies to, and excludes coverage for, plaintiff's claims under the policy." *Id.* at 12-14. Travelers' arguments refer to paragraph (B) (1) (g) of the section of the policy entitled "Causes of Loss - Special Form," which provides, as follows:

"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 event that contributes concurrently or in any sequence to 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;
- "(2) Mudslide or mudflow;

- “(3) Water or sewage that backs up or overflows from a sewer, drain or sump; or
 - “(4) Water on the ground surface pressing on, or flowing or seeping through:
 - (a) foundations, walls, floors or paved surfaces;
 - (b) basements, whether paved or not; or
 - (c) doors, windows or other openings;
- “all whether naturally occurring or due to man-made or other artificial causes.”

See notice of motion, Coffin aff, exhibit 1. Travelers then cites the decision of the Appellate Division, Second Department, in *Jahier v Liberty Mut. Group* (64 AD3d 683 [2d Dept 2009]), which enforced an identically worded “water damage exclusion” that also contained a “concurrent loss” provision. Travelers finally cites to the results of Carter’s and Feaster’s inspections of the Passaic warehouse, as proof that the damage to Artvale’s inventory was caused by flooding and/or sewer backup. See defendant’s mem of law at 12. But Travelers has placed its arguments in reverse order.

First, the plain language of the policy clearly excludes coverage for any damage or loss caused by “flood” or “water or sewage that backs up or overflows.” See notice of motion, exhibit I. Travelers has presented copies of USGS data — showing that flooding took place in the vicinity of the Passaic warehouse at the time of Hurricane Irene — and the EBT testimony of two claims adjusters, who inspected the warehouse shortly thereafter and observed flood damage. The court finds that Travelers has presented sufficient evidence to meet its burden of proving that the policy’s flood exclusion applies to Artvale’s claim. Accordingly, the burden shifts to Artvale to demonstrate an exception to this exclusion. See e.g. *ITT Indus. v Factory Mut. Ins. Co.*, 303 AD2d 177, 177 (1st Dept 2003). Artvale attempts to do so by arguing that there is an issue of fact about whether the damage to its inventory was caused by rainwater intrusion into the Passaic warehouse before the flooding. See plaintiff’s mem of law at 3-8. This argument fails, however, because it is irrelevant.

Second, the plain language of the policy’s “concurrent loss” clause excludes coverage for flood damage “regardless of any other cause or event that contributes concurrently or in any sequence to the loss.” See notice of motion, exhibit A. Thus, Artvale’s allegation, that the heavy wind and rain that preceded Hurricane Irene’s flooding may have caused damage to its inventory prior to said flooding, merely describes an “event” which “contributed concurrently or in any sequence” to said damage. In *Jahier v Liberty Mut. Group*, the Second Department upheld the concurrent loss exclusion, after finding that “the evidence demonstrated that the plaintiffs’ loss was attributable to the subsurface water pressure that was exerted upon the empty swimming pool, even though it was precipitated by the drainage of the pool and heavy rainfall.” 64 AD3d at 685. In this case, too, the overflow of the Passaic River and the flooding at the Passaic warehouse was clearly precipitated by hurricane strength rainfall. But this does not change the fact that the damage to Artvale’s inventory was caused by flood damage, nor does it contradict the causal finding that was confirmed by Carter’s and Feaster’s inspections. Artvale’s argument

in opposition is unpersuasive. Accordingly, Travelers' motion is granted.

Accordingly, it is

ORDERED that the motion, pursuant to CPLR 3212, of defendant Travelers Indemnity Company is granted, and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant Travelers Indemnity Company must serve a copy of this decision and order on all parties and on the County Clerk's Office, which is directed to enter judgment accordingly; and it is further

Dated: June 27, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.