SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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FIFTH AVENUE CLOTHING COMPANY INC.,

Plaintiff,

- V -

THE HARTFORD INSURANCE COMPANY,

Defendant.

INDEX NO. 653261/2017

MOTION DATE 08/03/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, defendant's motion for summary judgment is granted.

Background

In this insurance coverage dispute, plaintiff Fifth Avenue Clothing Company Inc. seeks monetary damages resulting from an alleged breach of the terms and conditions of an insurance policy by defendant Sentinel Insurance Company, Ltd. (improperly sued as Hartford Insurance Company). Defendant had declined coverage of plaintiff's claim for damages to business property arising out of a motor vehicle accident that occurred on June 13, 2015, asserting that the alleged damage sustained to plaintiff's property was not covered under the subject insurance policy.

The facts, simply stated, are as follows. On September 10, 2014, defendant issued plaintiff a Business Owners' insurance policy bearing number 12SBAUK7272 (the "Policy"). On June 13, 2015, non-party Chris Franchey ("Franchey"), the president of plaintiff, was driving a truck containing business property for delivery from plaintiff's retail store, located at 581 Fifth Ave., New York, NY, to 120 Milbar Blvd., Farmingdale, NY. While operating the truck on the Northern State Parkway in Westbury, NY, Franchey struck an overpass. As a result, the roof of the truck over the cargo area, where the business property was contained, was damaged. In the complaint, plaintiff alleges that the business property contained in the truck sustained insured losses "arising from exposure to the elements" after the truck struck the overpass. Subsequently, plaintiff submitted a claim to defendant for coverage; and defendant denied coverage on the ground that the alleged damage was not covered under the Policy.

On June 14, 2017, plaintiff commenced the instant action under a breach of contract theory, seeking judgment in an amount to be determined at trial. Defendant, in its answer, admitted issuing the Policy to plaintiff and that the Policy constituted a contract between the parties, and asserted seventeen affirmative defenses, the here-pertinent ones being that plaintiff's claims are

barred because the property and the losses incurred are not covered pursuant to the terms of the Policy.

On February 1, 2018 defendant served plaintiff with its first set of interrogatories and first requests to admit. On April 13, 2018 Plaintiff responded to the discovery requests, painting a clearer picture of what occurred following the June 13, 2015 accident. Plaintiff admitted that following the accident, Franchey did not report the accident but, instead, safeguarded the business property and then drove the truck to its destination in Farmingdale, leaving the property in the truck at that location. Plaintiff also admitted that the property was damaged because it "got wet."

Defendant now moves, pursuant to CPLR 3212, for summary judgment in its favor. In support of its motion defendant points to plaintiff's responses to defendant's requests for discovery. Specifically, in response to defendant's request to admit, plaintiff admitted that the business property did not sustain damage during transit on June 13, 2015. Additionally, in response to one interrogatory, plaintiff admitted that the provision within the Policy that affords coverage for the alleged loss is the "Transit Coverage – Property in the Care of Carriers for Hire" Endorsement (the "Endorsement"). As a result, defendant argues there are no questions of material fact that preclude granting summary judgment, because the business property did not sustain any damage caused by or resulting from a covered cause of loss during transit on June 13, 2015, as required under the Policy, more specifically, the Endorsement.

Plaintiff opposes the motion upon the ground that the Policy covers the alleged loss sustained to the business property. In plaintiff's opposition, plaintiff alleges (for the first time) that once the truck struck the overpass, certain goods were damaged, and some were strewn onto the highway and could not be recovered. Plaintiff's opposition further alleges that once Franchey arrived at the destination in Farmingdale Franchey was unable to remove safely the property from the truck. As such, the property remained in the truck until July 15, 2015 (this Court will assume that the date contains a typographical error) a rainy day, when Franchey had hired a few men for the day to assist him in removing the property. Once the property was removed it was given to the salesperson at the store located in Farmingdale, at which point in time it was discovered that the rain had damaged the property. Plaintiff alleges that, in its opinion, until the property was handed over to the salesperson in Farmingdale, the property remained insured because it was still "in transit." Despite the fact that plaintiff had answered defendant's interrogatory stating that coverage under the Policy was afforded under the Endorsement, plaintiff argues (for the first time) that even if the property was no longer in transit, to afford coverage under the Endorsement, the Policy still covered the alleged loss because pursuant to the Policy, business property remains insured while on the premises and the property got wet and damaged while on the premises.

Plaintiff's Business Owners' Insurance Policy from Defendant

The Policy defendant issued to plaintiff includes a "Special Property Coverage Form" that sets forth, in pertinent part:

A. COVERAGE

We will pay for direct physical loss of or physical damage to Covered Property at the premises described in the Declarations (also called "scheduled premises" in this policy) caused by or resulting from a Covered Cause of Loss.

1. Covered Property

Covered Property as used in this policy, means the following types of property for which a Limit of Insurance is shown in the Declarations:

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b. Business Personal Property located in or on the building(s) described in the Declarations at the "scheduled premises" or in the open (or in a vehicle) within 1,000 feet of the "scheduled premises", including:

(1) Property you own that is used in your business…

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(3) Property of others that is in your care, custody or control…

The Policy declares that there are three premises: (1) 581 5th Avenue, New York, NY; (2) 203 S State Street, Chicago, IL; and (3) 206 E 86th Street, New York, NY.

The "Special Property Coverage Form" of the Policy is modified by the Endorsement. The Endorsement extends coverage as follows:

SPECIAL PROPERTY COVERAGE FORM

Except as otherwise stated in this endorsement the terms and conditions of the policy and of the Special Property Coverage Form apply to the insurance stated below.

B. Transit Coverage – Property in the Care of Carriers for Hire

1. The insurance that applies to your Business Personal Property and Personal Property of Others is extended to apply to shipments of that property while in transit at your risk, by motor vehicle, railroad car or aircraft between points within [the United States, Puerto Rico, and Canada]. This includes property you have sold and for which your responsibility continues until it is delivered.

The Endorsement contains the following exclusions:

C. Under this Transit Coverage – Property in the Care of Carriers for Hire, we will not pay for:

1. Property in the care, custody or control of your salespersons.

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4. Property in or on a motor vehicle you own, lease or operate.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Once that burden is met, the opponent must tender evidence in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim …mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Zuckerman v City of New York, 49 NY2d 447, 562 (1980).

As with any contract, the interpretation of an unambiguous provision of an insurance contract is within the power of the Court to determine as a matter of law. Stainless, Inc. v Employers Fire Ins. Co., 69 AD2d 27, 32 (1st Dept 1979) ("Where the terms and conditions of a policy of insurance are ascertained, its coverage, meaning and intent present questions of law to be determined by the court.") (citing Dwight v Germania Life Ins. Co., 103 NY 341 (Ct App 1886).

Defendant has met its burden of establishing a prima facie showing of entitlement to judgment as a matter of law by submitting a copy of the Policy and plaintiff's responses to defendant's discovery demands, all of which illustrate that there is no coverage under the Policy.

Plaintiff has failed to tender any evidence showing that a material question of fact exists. Plaintiff's opposition is filled with unsubstantiated allegations which are insufficient and do not raise issues of fact. Indeed, the allegations in plaintiff's opposition confirm that there is no coverage under the Policy. First off, to trigger the Endorsement, plaintiff must prove that the insured items were being transported by a "carrier for hire." The Federal Motor Carrier Safety Administration states as follows:

> An authorized for-hire motor carrier transports passengers, regulated property or household goods owned by others for compensation. If you are a for-hire carrier, in addition to the USDOT number you will also need to obtain operation authority (MC number).

Plaintiff's opposition makes clear that the truck Franchey operated on June 13, 2015 was owned by Florida Classic Autos, Inc., an entity formed to own vehicles that plaintiff uses to transport its goods. Plaintiff has not proffered any evidence illustrating that Florida Classic Autos, Inc. was a "carrier for hire." The facts are clear that Florida Classic Autos, Inc. did not transport the property but merely provided plaintiff with a means to do so. In fact, one of the exclusions under the Endorsement is property "in or on a motor vehicle you own, lease or operate." Plaintiff's opposition makes clear that Franchey was the individual who operated the truck which was obtained from Florida Classic Autos, Inc. As such, this specific exclusion in the Endorsement applies.

As to plaintiff's opinion that until the property was given to the salesperson in Farmingdale the property remained insured because it was still "in transit," that argument is conclusory and irrelevant. The Policy does state that transit includes "property you have sold and for which your responsibility continues until it is delivered." However, plaintiff failed to procure any evidence demonstrating that plaintiff had a responsibility to ensure delivery to the store in Farmingdale,

nor did plaintiff provide evidence of any contractual relationship between itself and the salespeople in Farmingdale. Thus, there is no evidence in the record to support the theory that transit was completed upon delivery. In any event, the remaining exclusion under the Endorsement applies here as the property was "in the care, custody or control" of plaintiff's salesperson (i.e., Franchey) at the time of the alleged damage. Furthermore, the property appears to have been damaged not while in transit but while sitting in the rain. Plaintiff admitted as such in response to defendant's first request to admit when it admitted that the property did not sustain damage during transit on June 13, 2015. Although plaintiff's opposition alleges that property was damaged as a result of the truck striking the overpass, the allegation is unsubstantiated, as plaintiff has failed to provide any evidence to corroborate that allegation.

As to plaintiff's newly asserted argument that the Policy covers the alleged damage because the property was damaged while on the premises, this argument is unavailing. As quoted above, the Policy covers "Business Personal Property located in or on the building(s) described in the Declarations at the 'scheduled premises' or in the open (or in a vehicle) within 1,000 feet of the 'scheduled premises.'" As stated above, the Policy declarations list only three locations as "scheduled premises." None of the three locations include the transit destination located at 120 Milbar Blvd., Farmingdale, NY, and none of the three locations are within 1,000 feet of said location. As such, there is no coverage under any provision of the Policy because the transit destination in Farmingdale is not a "scheduled premises" or within 1,000 feet of any of the "scheduled premises" set forth in the Policy.

Conclusion

Motion granted. The Clerk is hereby directed to enter judgment in favor of defendant and against plaintiff dismissing the complaint.

2/19/2019
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE