Certain Underwriters at Lloyd's v Bioenergy Dev. Group LLC
2020 NY Slip Op 30320(U)
January 22, 2020
Supreme Court, New York County
Docket Number: 655792/2017
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

---X

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO GCUBE POLICY NUMBER BI154335601, RSA INSURANCE GROUP PLC SUBSCRIBING TO PERSE POLICY NUMBER BI154335601

Plaintiff,

- v -

BIOENERGY DEVELOPMENT GROUP LLC, AGRILEUM LLC,

Defendant.

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INDEX NO. 655792/2017

MOTION DATE 09/03/2019, 09/09/2019

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 277, 278, 313, 314, 315, 316, 317

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 318

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Motion sequences nos. 007 and 008 are consolidated for disposition. Upon the foregoing documents and for the reasons set forth on the record (1/16/2020), BioEnergy Development Group LLC (**BioEnergy**) and Agrileum LLC (BioEnergy and Agrileum LLC, collectively, the **Defendants**) motion for summary judgment (Mtn. Seq. 007) is granted as set forth below and Certain Underwriters at Lloyd's, London Subscribing to GCube Policy Number BI154335601 and RSA Insurance Group PLC Subscribing to PERse Policy Number BI154335601

(collectively, the **Plaintiffs**) motion for summary judgment (Mtn. Seq. 008) is denied in its entirety.

The Relevant Facts and Circumstances

On March 18, 2016, a fire destroyed portions of BioEnergy's biodiesel manufacturing plant located in Memphis, Tennessee (NYSCEF Doc. No. 217, ¶¶ 4-5). The Plaintiffs provided property damage and business interruption insurance to the Defendants for the policy period of September 14, 2015 to September 14, 2016 (*id.*, ¶ 6). The two insurance policies involved were the GCube Policy and the PERse Policy (collectively, the **Policies**).

On September 12, 2017, the Plaintiffs commenced this action to obtain: (1) a declaration that the Policies limit the Defendants' business interruption loss to $15,100,000 and (2) a declaration that the Policies do not cover the tax adjusted value of BioEnergy's Claim for lost blender's tax credits (NYSCEF Doc. No. 1). In its answer and counterclaims, the Defendants asserted counterclaims for: (1) breach of contract and (2) a declaratory judgment (NYSCEF Doc. No. 39).

Pursuant to a letter from BioEnergy to the Plaintiffs (NYSCEF Doc. No. 233), dated August 11, 2017, BioEnergy invoked the appraisal clause to resolve the amount of business interruption and property damage losses pursuant to the Policies:

> If the Insured and Underwriters hereunder fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty (60) days after receipt of proof of loss by Underwriters hereon, select a competent and disinterested appraiser. The appraisal shall be made at a reasonable time and place … The appraisers shall then appraise the loss, stating separately the value at the time of loss and the amount of loss, and failing to agree, shall submit their difference to the umpire. An award in writing of any two shall determine the amount of loss. (NYSCEF Doc. No. 218, at 13; NYSCEF Doc. No. 219, at 9).

On December 31, 2018, the appraisal panel determined that the property damage award was the cost to repair/replace the property on an "as was" basis of $24,617,631 (NYSCEF Doc. No. 222, the **Award**). However, the appraisal panel also stated that:

> [w]hile the "as was" amount was agreed to on a unanimous basis, the total award amount was not reached on a unanimous basis. One of the panel members asserts that all of the damaged property was equipment, and therefore the sublimit for machinery and contents of $10.3 million should be the total award. The other two panelists disagreed with this assertion, and therefore the appraised amount owed according to the panel is $24,617,631. (*Id.*).

Dissatisfied with the appraisal results, the Plaintiffs sought clarification, by email dated January 3, 2019, as to the allocation of the Award pursuant to an (NYSCEF Doc. No. 234). In an email response to the Plaintiffs (NYSCEF Doc. No. 235), dated January 8, 2019, the appraisal panel subsequently confirmed an allocation of $9,900,000 to "Machinery and Contents" and $14,700,000 to "Building." Pursuant to motion sequence 005, the Defendants moved to confirm the appraisal award and this court confirmed the same in a decision and order, dated March 12, 2019 (NYSCEF Doc. No. 174).

The Policies contained schedules titled "Limits of Liability" which set forth the insured amount of insurance for property damage and business interruption loss. Under the GCube Policy's Limits of Liability provision, $26,030,000 was for "Physical Damage" consisting of $15,800,000 for "Buildings" and $10,230,000 for "Machinery and Contents," and $15,100,000 for "Loss of Income" (NYSCEF Doc. No. 218, at 7, the **GCube Policy**). Under the PERse Policy's Limits of Liability provision, $26,030,000 was for "Total Physical Damage Value" without further allocation and $15,100,000 for "Total Business Interruption" (NYSCEF Doc. No. 219, at 7, the

PERse Policy). Here, the parties do not dispute that the Defendants' business interruption loss is in excess of the limit of liability in the Policies and the Plaintiffs have now paid $15,100,000 in business interruption loss (NYSCEF Doc. No. 217, ¶ 15).

The Policies provided for a 125% escalated recovery of the original scheduled amount provided that the escalated amount does not exceed the total agreed upon exposure. To wit, the Policies provide in relevant part that:

> [i]f during the period of insurance the actual reinstatement value of the insured Property or the actual Gross Profit or the Project as a whole shall be in excess of the original Limit of Liability, then the Limit of Liability shall be increased by the amount of such excess but only up to 125% of the Limit of Liability as detailed in the Policy Schedule, but never more than the Total Project Limit. (NYSCEF Doc. No. 218, at 15; NYSCEF Doc. No. 219, at 11).

The reinstatement provision provided that:

> With the exception of loss caused by perils which are subject to annual aggregate limits as stated in the Limits of Liability for the respective Section, it is a condition of this Policy that in case of loss occurring hereunder, the amount of such loss be automatically reinstated after its occurrence without payment of additional premium for such reinstatement. Such reinstatement shall not increase the Underwriters' liability to an amount that would otherwise be payable in respect of any one claim. (NYSCEF Doc. No. 218, at 16; NYSCEF Doc. No. 219, at 13).

The Policies also provided coverage for business interruption as follows:

> **SECTION 3(b) - OPERATING ALL RISKS BUSINESS INTERRUPTION**
>
> Subject always to the general conditions and exclusions of this Policy, this Section of this Policy indemnifies the Insured with respect to:
>
> 1. Loss of Gross Profits as previously stated under Insuring Clause (B) resulting directly from the interruption of or interference with their business during the Indemnity Period caused by an Insured Event for which Underwriters are liable under Section 3(a) of this Policy.
>
> ...

Basis of Settlement for Business Interruption (Item 1. above)

> In the event of such loss or damage, Underwriters hereon shall be liable for the actual loss sustained by the Insured resulting directly from such interruption of business, but not exceeding the Gross Revenue (including tax credits or similar incentives), less non-continuing costs which do not necessarily continue during the interruption of business, , [sic] and only for such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair, or replace such part of the property as has been lost or damaged, commencing with the date of such loss or damage, and ending on the date of resumption or normal operation or the expiry of the Indemnity Period, whichever the earlier. (NYSCEF Doc. No. 218, at 26; NYSCEF Doc. No. 219, at 27).

To date, $5,115,000 has been paid pursuant to the GCube Policy and $5,115,000 has been paid pursuant to the PERse Policy for the Award (NYSCEF Doc. No. 217, ¶¶ 13-14). The Plaintiffs have paid $15,100,000 for the Defendants' business interruption loss (*id*, ¶ 15). On February 9, 2018, BioEnergy demanded that the Plaintiffs pay business interruption loss of $18,875,000 pursuant to the escalation provision, which the Plaintiffs refused and claimed that the escalation provision only applies to subsequent and not an initial loss by the insured (*id.*, ¶ 18). The Plaintiffs have also refused to pay the outstanding balance due on the physical damage award, notwithstanding this court's confirmation of the same in motion sequence no. 005, because this decision has been appealed to the First Department.

On October 22, 2018, New York State Supreme Court Justice Charles Ramos dismissed the plaintiffs first counterclaim for breach of the Policies' escalation provisions and breach of the implied duty of good faith and fair dealing (NYSCEF Doc. No. 62). Recently, on December 5, 2019, the First Department reversed, reinstating those counterclaims (NYSCEF Doc. No. 321).

Now, in motion sequence no. 007, the Defendants move pursuant to CPLR §§ 3212 and 5001 for the entry of judgment (i) on the unpaid physical damage loss, (ii) the unpaid escalated amount of

business interruption loss of $1,662,369 pursuant to the escalation provision and (iii) prejudgment interest on the unpaid physical damage loss and unpaid business interruption loss.

In motion sequence no. 008, the Plaintiffs move for summary judgment as to (1) whether BioEnergy materially misrepresented its insured property values, (2) whether the Policies cover BioEnergy's tax liabilities on its blender's credits, and (3) a determination concerning the application of the escalation and reinstatement provisions. The Defendants also cross-move to strike certain affidavits and exhibits that the Plaintiffs submitted in support of their summary judgment motion.

I. Motion Sequence 007 (Defendants' Motion for Summary Judgment)

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opposing party must then "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" that its claim rests upon (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

The Unpaid Portion of the Award

The Defendants argue that pursuant to the court's confirmation of the Award, judgment should be entered on that portion of the Award that remains unpaid by the Plaintiffs. The court agrees. It is undisputed that to date, the Plaintiffs have only paid $10,230,000 of the Award (NYSCEF Doc. No. 217, ¶¶ 13-14). Although the Plaintiffs argue that the Defendants materially

misrepresented the value of its property, this argument is unavailing for the reasons set forth below. Accordingly, the branch of the Defendants' motion for entry of judgment on the unpaid portion of the Award is granted.

The Escalation Amount of $1,622,369

A contract that is clear and unambiguous must be enforced in accordance with its plain meaning (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). The court may not consider extrinsic evidence where a contract is clear on its face and where the intention of the parties can be gathered from the four corners of the contract (*Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). Further, "[every] clause or word is deemed to have some meaning" (*Bretton v Mut. of Omaha Ins. Co.*, 110 AD2d 46, 49 [1st Dept 1985], citing *Theatre Guild Prods., Inc. v Ins. Corp. of Ireland*, 25 AD2d 109, 111 [1st Dept 1966]).

The Defendants argue that the plain meaning of the escalation provision requires the Plaintiffs to pay BioEnergy additional business interruption losses of approximately $1.6 million because the escalation provision increases the physical damage or business interruption sublimit of up to 125% in the event that actual property damage or business interruption losses exceed the applicable sublimit. In opposition, the Plaintiffs argue that the court should interpret the escalation provision together with the reinstatement provision to increase the original limit of liability only where there is more than one covered loss under the Policies, and notwithstanding the fact that the reinstatement provision does not have any language that it only applies to subsequent losses.

Put simply, the reinstatement provision provides that if a loss occurs, the amount of that loss is automatically reinstated "after its occurrence without payment of additional premium for such reinstatement" (NYSCEF Doc. No. 218, at 16; NYSCEF Doc. No. 219, at 13). In other words, should a covered loss occur under the Policies, the reinstatement provision will automatically restore the policy limits, which apply should another loss occur within the same policy period. The plain meaning of the escalation provision provides that where "the actual reinstatement value of the insured Property or the actual Gross Profit or the Project" exceeds the original limit of liability, the limit of liability will be increased up to 125%, but not more than the total project limit (NYSCEF Doc. No. 218, at 15; NYSCEF Doc. No. 219, at 11). There simply is no language in the Policies that indicates that the 125% escalation recovery does not apply to the first loss and only applies to subsequent losses. Such a tortured reading of the Policies is also not supported by anything else in the record.

Under these circumstances, the escalation provision applies to increase the Defendants' original business interruption sublimit of $15,100,000 by 125% to $18,875,000. The Defendants assert that they are due $16,929,566 in business interruption loss, but inasmuch as that would exceed the total recoverable limits under the Policies by approximately $160,000, the Defendants are only due $1,662,369 of the adjusted business interruption loss (NYSCEF Doc. No. 217, ¶ 20), which sum is not contested by the Plaintiffs in their opposition to this motion. The Defendants are therefore entitled to recover an additional sum of $1,662,369 in business interruption loss under the Policies and to entry of judgment on the same. Accordingly, the branch of the Defendants' motion to dismiss the Plaintiff's first cause of action is granted.

Prejudgment Interest

The Defendants are also entitled to prejudgment interest pursuant to CPLR § 5001 on the unpaid balance of the Award and the adjusted business interruption loss (*see Buttignol Constr. Co. v Allstate Ins. Co.*, 22 AD2d 689, 689 [2d Dept 1964] [awarding prejudgment interest on an appraisal award from the date it was made because this was the date that the insurer was deemed to have breached the insurance contract]). It is undisputed that the Award has not been paid since it was clarified on January 8, 2019, in breach of the Policies. The Plaintiffs have also refused to pay the adjusted balance owing on the business interruption loss since the Defendants' demand on February 9, 2018. Accordingly, the branch of the Defendants' motion for prejudgment interest on amounts owed under the Award and the adjusted business interruption loss is granted.

II. Motion Sequence 008 (Plaintiffs' Motion for Summary Judgment)

Material Misrepresentation by the Defendants

The Policies provide that insurers are entitled to avoid liability if a material misrepresentation is made (NYSCEF Doc. No. 218, at 15; NYSCEF Doc. No. 219, at 11-12). Although the materiality of a misrepresentation generally poses a question of fact for a jury, the court may resolve the issue where a party presents clear and substantially uncontradicted evidence concerning materiality (*Dwyer v First Unum Life Ins. Co.*, 41 AD3d 115, 116 [1st Dept 2007]). Such evidence may be provided by an affidavit of the relevant underwriter, along with company guidelines (*see E. 115th St. Realty Corp. v Focus & Struga Bldg. Developers LLC*, 85 AD3d 511, 511 [1st Dept 2011] [affirming the trial court's finding on summary judgment that an insurance

policy was void due to a material misrepresentation upon an affidavit from the underwriter with the relevant underwriting guidelines]).

The Plaintiffs argue that Policies should be void because the Defendants made a material misrepresentation pursuant to the Policies regarding the value of its property during the underwriting process. In support of its argument, the Plaintiff adduced an affidavit from Michael J. Bernay (NYSCEF Doc. No. 242, the **Bernay Affidavit**), the CEO/Managing Director of PERse, and an affirmation from Plaintiffs' counsel, Matthew L. Gonzalez (NYSCEF Doc. No. 239, the **Gonzalez Affidavit**). The Defendants cross-move to strike the Bernay Affidavit and Gonzalez Affidavit because they attest to information that neither individuals have personal knowledge about.

In the Bernay Affidavit, Mr. Bernay states that he supervised and assisted with underwriting the insurance policy "for the period September 14, 2014 to September 13, 2015" which policy preceded the Policies that are at issue in this action (NYSCEF Doc. No. 242, ¶ 3). There is no indication that Mr. Bernay was personally involved or obtained personal knowledge of underwriting procedures for the Policies that covered the policy period of September 14, 2015 to September 14, 2016. To wit, his affidavit only indicates that the Policies were renewed for the relevant policy period of 2015-2016 (*id.*, ¶ 4) – i.e., he does not say he was involved in any way in negotiating this extension.

In the Gonzalez Affidavit, Mr. Gonzalez attaches exhibits such as GCube's product that was available to Defendants in 2014, PERse's product that was available to Defendants in 2014, and

a copy of PERse's underwriting guidelines (NYSCEF Doc. No. 239, ¶¶ 8-10). While an attorney is generally permitted to append documents that constitute evidentiary proof in admissible form, such documents are not admissible where the attorney fails to demonstrate personal knowledge of the contents concerning the document (*Zuckerman v New York*, 49 NY2d 557, 563 [1980] [explaining that an attorney affidavit was insufficient to raise a material fact to avoid summary judgment because the bare attorney affirmation demonstrated no personal knowledge about how the accident occurred]). For this reason, those portions of the Gonzalez Affidavit purporting to adduce evidence concerning negotiation of the Policies and the PERse underwriting guidelines are without evidentiary value because Mr. Gonzalez asserts no basis for his knowledge of the same.

Although the Plaintiffs purported to correct the evidentiary deficiencies in their summary judgment motion by adducing an affidavit from Jeff Richards (NYSCEF Doc. No. 288), senior underwriter at PERse, the court may not consider such evidence when it is submitted for the first time in opposition to the Defendants' cross-motion (*see Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010] [explaining that deficient proof in moving papers cannot be cured by submitting evidentiary material in reply because a reply is not a vehicle for a movant to introduce new arguments or new grounds for the motion]). Given the foregoing, the Plaintiffs have failed to provide any clear and uncontradicted evidence that the Defendants made a material misrepresentation concerning the value of the insured property. In addition, and without limiting the foregoing, this information regarding the appraisal of the property is information which could or should have been provided to the appraisal panel, and ultimately amounts to a transparent attempt to again contest the findings of the appraisal panel, and to now allege a new basis which

was not properly raised in objecting to the confirmation of the Award (*See* Mtn. Seq. No. 5 Decision and Order and *citing 936 Second Ave., L.P. v Second Corporate Dev., Co., Inc.*, 82 AD3d 446, 446 [1st Dept 2011]). Accordingly, the branch of the Plaintiffs' motion for summary judgment to void the Policies for a material misrepresentation is denied and the Defendants' cross-motion to strike the Bernay Affidavit and Gonzalez Affidavit is granted.

Coverage for BioEnergy's Tax Credits

As the court has determined that the escalation provision applies to adjust the Defendants' business interruption loss, it is no longer necessary to resolve whether the Policies cover certain tax credits that were applied retroactively and this branch of the Plaintiff's motion for summary judgment is denied as moot.

III. The Plaintiffs' Defenses to the Defendants' First Counterclaim for Breach of Contract

During oral argument, the Plaintiffs also asserted that the First Department's decision to reinstate the Defendants' first counterclaim (breaching the escalation provision, which the court addresses herein, and breach of the covenant of good faith and fair dealing) provides the Plaintiffs the ability to raise new affirmative defenses – i.e., purported material misrepresentation as to the values of the scheduled policy limit amounts which ultimately were the subject of the findings of the appraisal panel in determining the Award. The argument fails as yet another attempt to relitigate the issue of the amount of the Award itself.

Courts routinely enforce appraisal awards in the same manner that an arbitration agreement is enforced under CPLR Article 75 (*see Liberty Fabrics v Corporate Props. Assoc. 5*, 223 AD2d

457, 457 [1st Dept 1996] [affirming an appraisal of five commercial properties in the absence of fraud, bias, or bad faith]). CPLR § 7601 provides the mechanism to confirm an appraisal award as follows:

> A special proceeding may be commenced to specifically enforce an agreement that a question of valuation, appraisal or other issue or controversy be determined by a person named or to be selected. The court may enforce such an agreement as if it were an arbitration agreement, in which case the proceeding shall be conducted as if brought under article seventy-five of this chapter. Where there is a defense which would require dismissal of an action for breach of the agreement, the proceeding shall be dismissed. Provided, however, that this section shall not apply to any agreement contained in the standard fire insurance policy of the state with the exception of an action to enforce the appraisal clause pursuant to section three thousand four hundred eight of the insurance law which shall not be enforced as an arbitration agreement.

To the extent that the Plaintiffs failed to raise any fraud in opposition to confirmation of the Award under motion sequence 005, this argument is accordingly waived. In motion sequence 008, the Plaintiffs do not now allege fraud as to the appraisal panel's assessment of the Award, but fraud as to the amount of coverage that the Defendants secured for its property. However, it is the Plaintiffs who were equally responsible for examining the risk that it intended to underwrite. If the Plaintiffs failed to undertake due diligence in making its underwriting decision by performing an inspection or otherwise, the Plaintiffs cannot now use this as a basis to avoid their obligations pursuant to the Policies.

Accordingly, it is

ORDERED that the Defendants' motion for summary judgment (mtn. seq. no. 007) is granted to the extent that the Plaintiffs' first cause of action is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of BioEnergy Development Group, LLC and Agrileum LLC and against Certain Underwriters at Lloyd's, London Subscribing to GCube Policy Number BI154335601 and RSA Insurance Group PLC Subscribing to PERse Policy Number BI154335601 in the amount of

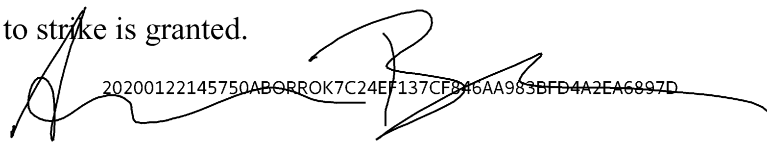
(i) $14,137,631, plus statutory interest of 9% from January 8, 2019 until the date of entry of judgment, plus statutory interest of 9% per annum from the date of entry of judgment, plus costs and disbursements as allocated by the Clerk; and

(ii) $1,662,369, plus statutory interest of 9% from February 9, 2018 until the date of entry of judgment, plus statutory interest of 9% per annum from the date of entry of judgment, plus costs and disbursements as allocated by the Clerk

and the Defendants shall have execution thereof; and it is further

ORDERED that the Plaintiffs' motion for summary judgment (mtn. seq. no. 008) is denied; and it is further

ORDERED that the Defendants' cross-motion to strike is granted.



1/22/2020
DATE

ANDREW BORROK, J.S.C.

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