

**Borah, Goldstein, Altschuler, Nahins & Goidel, P.C.
v Trumbull Ins. Co.**

2017 NY Slip Op 30203(U)

January 20, 2017

Supreme Court, New York County

Docket Number: 652633/2013

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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BORAH, GOLDSTEIN, ALTSCHULER, NAHINS
& GOIDEL, P.C.,

Plaintiff,

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-against-

Mtn Seq. No. 002

TRUMBULL INSURANCE COMPANY a/k/a
THE HARTFORD and CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,

DECISION AND ORDER

Defendants.

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JEFFREY K. OING, J.:

This action stems from, in part, plaintiff law firm's, Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., claims against its insurer, Trumbull Insurance Company a/k/a The Hartford ("Trumbull"), for damages it sustained in late October through early November 2012 as a result of tropical storm Sandy ("Sandy"), and a computer virus attack known as "Zero-Day." Plaintiff submitted these claims to Trumbull under the Hartford Spectrum Business Insurance Policy (the "business policy") for business interruption as a result of Sandy, and the Hartford Computer and Electronic Equipment Policy (the "computer policy") for damages associated with the Zero-Day virus. Trumbull denied these claims and this action ensued.

In a prior motion, plaintiff moved for partial summary judgment as to Trumbull's liability on the following relevant

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causes of action:¹ declaratory relief under the Special Property Coverage Form, Section Q, entitled "Civil Authority" of the Business Policy (first cause of action); declaratory relief for Trumbull's failure to reserve its rights under the Business Policy and requiring it to pay for damages sustained by plaintiff during plaintiff's business interruption from Friday, October 26, 2012 through the morning of November 5, 2012 (second cause of action); breach of contract for failing to indemnify plaintiff for its covered business interruption losses (third cause of action); breach of implied covenant of good faith and fair dealing (fourth cause of action); declaratory relief that Trumbull is obligated under its computer policy to reimburse plaintiff for its losses arising from the computer virus (sixth cause of action); declaratory relief that as a direct and proximate result of Trumbull's breach of its computer policy plaintiff sustained monetary damages (seventh cause of action); and breach of implied covenant of good faith and fair dealing (eighth cause of action). Trumbull cross-moved to dismiss those claims.

In a decision and order dated April 5, 2016 (NYSCEF Doc. No. 73) (the "decision and order"), this Court denied plaintiff's

¹The fifth cause of action against defendant Consolidated Edison Company of New York, Inc. is not at issue in this motion.

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motion and granted Trumbull's cross-motion to the extent of dismissing the first, second, third, and fourth causes of action, and denied the cross-motion as to the sixth, seventh, and eighth causes of action.

Plaintiff moves, pursuant to CPLR 2221(d), for an order granting it leave to reargue its prior motion for summary judgment and its opposition to Trumbull's cross-motion, and, upon reargument, denying Trumbull's cross-motion and granting plaintiff's motion as to Trumbull's liability on the first, second, third, fourth, sixth, seventh, and eighth causes of action. The prior decision and order provides the relevant factual background and familiarity is presumed.

A motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221(d)[2]). Here, plaintiff claims that this Court overlooked the impact of wind, a covered peril under the business policy, in causing plaintiff's business interruption damages. In addition, plaintiff argues that it should have been granted summary judgment as to liability on its computer virus claims because it was determined in the decision and order that plaintiff's policy covered those claims (Goldstein Aff., ¶ 19).

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Business Policy

Plaintiff argues that the claims set forth in the complaint that concern the business policy alleged wind as one of the causes of its Sandy-related business interruption damages. Plaintiff claims that it alleged in its prior motion that the parapet wall of the building in which plaintiff's business is located sustained wind damages as a result of Sandy in the amount of \$70,000 and that Trumbull ignored the impact of wind on plaintiff's premises. Referring to the "Business Income" provision of the Business Policy (section "o"), plaintiff argues "[i]t is undisputed that wind is a covered peril under plaintiff's business policy with Trumbull, and that the Business Policy provides coverage for business interruption caused by a covered peril" (Goldstein Aff., ¶ 34). Plaintiff also refers to the "Extra Expense" provision (section "p") and claims "Trumbull also ignored, and the Court overlooked, the fact that the Business Policy also provides plaintiff with 'Extra Expense' coverage for expenses plaintiff incurred to avoid or minimize the suspension of business and to continue 'operations'" (Goldstein Aff., ¶ 35). Essentially, plaintiff is claiming that its offices were closed due to wind damage to the parapet wall of the building (Goldstein Aff., ¶ 37) and that its business interruption claim is based on the wind damage to the parapet

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wall (see Goldstein Aff., ¶ 41). As such, plaintiff contends that the "Business Interruption" and the "Extra Expense" provisions of the Business Policy apply to the losses plaintiff claims it sustained.

That branch of plaintiff's motion to reargue based on a business interruption claim under the Business Income and Extra Expense provisions of the Business Policy is denied. A review of plaintiff's original moving papers confirm that plaintiff did not move for summary judgment pursuant to the Business Interruption and the Extra Expense provisions of the Business Policy, but, instead, the Civil Authority, the Off-Premises Utility Services, and the Dependent Properties provisions. Because arguments pursuant to the Business Interruption and Extra Expense provisions were not raised in the prior motion or in opposition to the cross-motion, they cannot be considered in this reargument motion (see William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 [1st Dept 1992] ["Reargument is not designed to afford the unsuccessful party successive opportunities to ... present arguments different from those originally asserted"]).

Further, plaintiff's attempt to show that wind damage was at the heart of its claims by referring to various portions of the complaint is unavailing. Plaintiff specifically referred to section q of the Business Policy, i.e., Civil Authority in the

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complaint (see e.g. Compl. ¶¶ 35, 38, 42, 59-66, 74, 78). As such, while wind damage was certainly raised by plaintiff in the complaint and during oral argument on the prior motion and cross-motion, plaintiff principally relied on the Civil Authority section of the Business Policy in the complaint, as well as the Off-Premises Utility Services and Dependent Properties provisions in the prior motion and cross-motion. Accordingly, with these new arguments, supra, plaintiff cannot demonstrate that this Court overlooked or misapprehended facts or law in rendering the decision and order as it pertains to the Business policy.

Computer Policy

Regarding that branch of plaintiff's motion to reargue the portion of the decision and order concerning the computer policy, it is granted, and upon reargument that branch of plaintiff's prior motion for summary judgment on liability under the computer policy is granted as to the sixth and seventh causes of action. As plaintiff points out, Trumbull's only claims in opposition to the motion and in support of the cross-motion concerned whether plaintiff sustained any recoverable damages, not whether the Zero-Day virus is a covered loss under the computer policy. Trumbull's arguments made in support of the cross-motion, that plaintiff cannot recover any damages under the computer policy because payments made to rectify the problem were made to a

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third-party contractor with whom plaintiff had a previous maintenance contract, were rejected by this Court in the decision and order. In addition, the document Trumbull proffered from its forensic accountant to demonstrate plaintiff sustained no business income loss was found insufficient. As such, plaintiff is entitled to summary judgment against Trumbull on liability as to the sixth and seventh causes of action.

Accordingly, it is hereby

ORDERED that branch of plaintiff's motion, pursuant to CPLR 2221(d), to reargue the portion of this Court's decision and order denying plaintiff partial summary judgment on liability as to the claims based on the Business Policy and granting Trumbull's cross-motion to dismiss those claims is denied; and it is further

ORDERED that branch of plaintiff's motion, pursuant to CPLR 2221(d), to reargue the portion of this Court's decision and order denying plaintiff summary judgment on liability based on its Computer Policy is granted, and upon reargument that branch of plaintiff's prior motion for summary judgment on liability under the computer policy is granted as to the sixth and seventh causes of action; and it is further

ORDERED that this matter is respectfully referred to the Clerk of the Special Referee to assign to a Special Referee or

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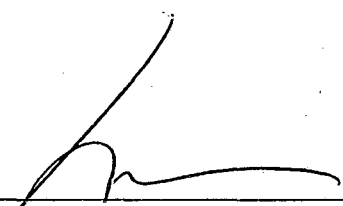
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JHO to hear and report, or if the parties so agree to hear and determine, plaintiff's damages under the Computer Policy, and it is further

ORDERED that counsel for plaintiff shall, within fourteen (14) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

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

Dated: 1/20/17


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