

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

ENDURANCE AMERICAN INSURANCE COMPANY,
ZURICH AMERICAN INSURANCE COMPANY, AND,
ATAIN INSURANCE COMPANY,

Plaintiff,

- v -

STONEX COMMODITY SOLUTIONS, LLC F/K/A FC
STONE MERCHANT SERVICES, LLC,

Defendant.

-----X

INDEX NO. 653234/2022

MOTION DATE 01/03/2024

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 106

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

This is a declaratory judgment action. Plaintiffs seek a declaration that, *inter alia*, that there is no coverage for the insurance claim made under the policy. Defendant now moves, pursuant to CPLR § 3212, for partial summary judgment on its first and second counterclaim.. Plaintiff opposes the instant motion. For the reasons set forth below, defendant’s motion is granted.

Background

From 2017 to 2021, defendant stored millions of bushels of soybeans at warehouses owned by non-party, Express Grain Terminals, LLC (“EGT”). In September 2021, upon the discovery by EGT’s lender that EGT had less inventory than it was reporting, EGT was forced into bankruptcy, resulting in the dispossession from StoneX of 2,780,000 bushels of soybeans subject to a determination by the bankruptcy court of various competing interests in the disposition of EGT’s assets. Ultimately, in the bankruptcy proceeding, defendant recovered all

but 502,315 bushels of soybeans. Defendant seeks coverage for the loss of these 502,315 bushels of soybeans. Plaintiff initiated the underlying action and denied the claim.

Summary Judgment Standard

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Discussion

In support of its motion defendant cites to the language of the insurance policy that provides that warehouse receipts, together with third-party inspection reports showing that the warehouse has sufficient goods to meet the insureds requirements, demonstrates the existence of an insurable interest. *See* NYSCEF Doc. 56, p. 58.

Defendant contends that the warehouse receipts establish that EGT was in possession of the requisite number of soybeans to cover the amount of defendant's soybeans. Further, inspection reports, prepared by independent inspectors, confirm that EGT maintained the appropriate number of soybeans to satisfy defendant's stored amount. With respect to the date of the loss, defendant contends that September 2021 is the date when it became actually dispossessed based on the bankruptcy filing by EGT.

Plaintiffs contend that the language used by the inspectors on the inspection reports creates a question of fact with respect to the existence of the amount soybeans stored with EGT. Specifically, plaintiffs contend that inspector indicating that “obligations to other depositors cannot be adequately verified [...] therefore I am unable to make any certifications on these actual obligations and their effect regarding these inventories” create an issue of act as to whether the soybeans for which defendant seeks coverage were in existence. *See* NYSCEF Docs. 60, 61. Further, plaintiffs contend that discovery is necessary to determine the applicability of the Misappropriation Exclusion in Endorsement 6. *See* NYSCEF Doc. 56, p. 61.

The Court finds that defendant has established an actual loss as well as an ascertainable date of the loss, September 29, 2021. The Court declines to read terms into the policy that are not there, specifically that defendant was required to ascertain whether EGT had sufficient soybeans to satisfy all receipt-holders. The parties could have contracted to include those terms in the policy but did not.

The Court disagrees with plaintiffs arguments that because at various times prior to the bankruptcy filing, EGT did not have enough soybeans to fulfill defendant’s requirements, the date of loss is outside of the policy term. The unrefuted evidence is that there were in fact a sufficient number of bushels of soybeans to satisfy defendants claim at the time EGT filed for bankruptcy, it follows that once EGT filed for bankruptcy defendant no longer had access to the soybeans, thus triggering the date of the loss. Plaintiffs have failed to raise a triable issue of fact.

The Court has reviewed the plaintiffs remaining contentions and finds them unavailing. Accordingly, it is hereby

ORDERED, that defendant’s motion for partial summary judgment on its first counterclaim is granted; and it is further

ADJUDGED and DECLARED there is insurance coverage to cover the loss of 502,315 bushels of soybeans; and it is further

ORDERED that defendant’s motion for summary judgment on its second counterclaim is granted; and it is further

ADJUDGED and DECLARED in that plaintiffs have breached the underlying contract between the parties for refusing to provide coverage.

20240108151805LFRANK758A776916774135A7CE411303517ED7

1/8/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE