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

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BERNSTEIN LIEBHARD LLP, Index No.: 652726/2015

Plaintiff,

-against- Mot. Seq. No.: 001

SENTINEL INSURANCE COMPANY, LIMITED

Decision and Order

Defendant.

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Masley, J.:

Plaintiff Bernstein Liebhard LLP (Bernstein) moves pursuant to CPLR 3001 and 3212 (e) for partial summary judgment on its sole cause of action for breach of an provision for lost business income in the insurance policy (the Policy) issued by defendant Sentinel Insurance Company Limited (Sentinel). Bernstein also moves to dismiss Sentinel's seventh affirmative defense arising from the same provision. Defendant Sentinel appears to cross move to dismiss the complaint in its entirety based on the same provision, though it does not ask for specific relief beyond summary judgment.

Paragraph O(4)(a) of the Policy defines "Business Income" as "Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no direct physical loss or physical damage had occurred." The Policy also limits recovery for business income losses to 12 months after the date of the damage.

A fire on August 22, 2013 destroyed the 28th floor of Bernstein's offices, on which its mass tort law practice, personnel, files, firm-wide computer servers, and telephone switches were located. As a result, Bernstein shut down its marketing efforts (mass tort television advertising) from August 2013 to March 2014. On July 23, 2014, Bernstein submitted a claim for $27 million arising from lost income from several hundred mass tort clients who failed to retain the firm during the 12-month period after the fire.

Sentinel denied the claim on July 20, 2015.

The parties agree that the Policy clearly provides that income must be "earned" during the applicable 12-month cutoff period. The issue, then, is when Bernstein "earns" a fee.

" 'Earned' can mean both received or entitled to" (*Heller v American States Ins. Co.*, 2017 US Dist LEXIS 3636, at *19 [CD Cal Jan. 9, 2017, No. CV 15-9771 DMG (JPRx)] [reciting Black's Law Dictionary [10th ed. 2014]). Ambiguities, if any, are construed against the drafter (*see Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704 [2012]). As the drafter, Sentinel has the burden of establishing that the Policy provision "is stated in clear and unmistakable language," "is subject to no other reasonable interpretation," and "that its interpretation . . . is the only construction that [could] fairly be placed thereon" (*Throgs Neck Bagels v GA Ins. Co. of N.Y.*, 241 AD2d 66, 71 [1st Dept 1998] [citations and quotation marks omitted).

In following *National Union Fire Ins. Co. Of Pittsburgh, Pa. v TransCanada Energy USA, Inc.* (153 AD3d 1153 [1st Dept 2017]), the court is compelled to grant Bernstein's motion. In *TransCanada*, the defendant, which sold energy production capacity, made a claim for lost business income when a power-generating turbine was taken out of operation during the policy period due to excessive vibrations caused by a crack (*see id.* at 1154 ["Because Unit 30 was not available to generate electricity from September 12, 2008 through May 18, 2009, TransCanada was unable to earn future capacity revenues that were attributable to the policy's period of liability."]). Likewise, here Bernstein had the capacity, lawyers, and staff to prosecute the cases for which it would have been retained during the applicable period, but the equipment damaged by the fire prevented it from taking those cases. Thus, but for the fire, Bernstein would

have earned its fees when those cases settled or were tried to verdict, possibly years later.

Sentinel argues that because every contract provision must be given meaning, such an interpretation renders the 12-month limitation period ineffectual. The court disagrees. *TransCanada* recognizes that recovery is not precluded where there is a certain loss within the applicable period, even if the loss cannot be quantified until sometime thereafter (*see generally id.*). Here, an economist or other expert could identify the relevant existing mass tort cases during the 12-month period, and opine as to the present value of those cases, despite the fact that the amount of the loss may not have been determinable until years after the fire.

Further, Sentinel's attempt to differentiate *TransCanada* is a distinction without a difference. The policies at issue in *TransCanada* and in this case both contain cutoff provisions. It is irrelevant whether that is, as here, a period of 12 months, or, as in *TransCanada*, a "liability period" calculated with a formula that incorporates a duration for repairs. Finally, Sentinel's attempt to distinguish *TransCanda* from this matter by focusing on "actual" earnings is telling: here, the Policy does not use the word "actual" in defining any of the relevant terms. The court finds that the loss of capacity to produce energy in *TransCanada* and the loss of Bernstein's income-producing mass tort case inventory is identical; in both instances, the opportunity to achieve that income during the applicable period was lost due to the respective damaging events.

To deny Bernstein coverage would be to punish it for its business model; that is, a mass tort business that is paid on a contingency-fee basis, as opposed to a traditional hourly basis. Similarly, in *Gates v State Auto Mut. Ins. Co.* (196 SW3d 761, 763 [Tenn Ct App 2005], *lv denied* 2006 Tenn LEXIS 502 [Tenn 2006]), a case cited by the First

Department in *TransCanada*, a furniture store in the business of rent-to-own payment plans was damaged by a tornado; the *Gates* court found that the store was entitled to the entire value of sale contracts that would have been signed during the period of closure, even though most of those payments would not have been due until after the restoration period had ended. The court in *Gates* rejected the insurer's argument that the court's interpretation of the coverage failed to account for customers who chose to go to another store, or wait for the damaged store to reopen; rather, those were issues for the trier of fact to resolve (*see id.* at 765-766*; see also E. Eric Guirard & Assoc. v America First Ins. Co.*,CIVA 07-9334, 2010 WL 1743193 [ED La Apr. 29, 2010] [finding that whether a law firm destroyed by Hurricane Katrina was entitled to lost business income for contingency-fee cases was a matter for the jury]).

Likewise, the court rejects Sentinel's reliance on *In re Thelen LLP* (24 NY3d 16, 22 [2014]), a case involving a firm that was paid on a traditional hourly basis. Sentinel's position is untenable. The business that it provided insurance coverage to, Bernstein, is a law firm; nothing it does concludes in one year. Sentinel accepted Bernstein's payments and insured its business income losses. When it issued the Policy in July 2013 for the period August 1, 2013 to August 1, 2014, Sentinel knew that Bernstein was in the business of representing mass tort clients on a contingency-fee basis. Applying Sentinel's theory of the coverage in this matter, there is no circumstance under which it would actually pay out for business income losses under the Policy. Sentinel's interpretation of the Policy, therefore, renders the insurance illusory.

Accordingly, it is

ORDERED that plaintiff's motion is granted and the court finds that plaintiff's losses incurred during the 12-month period following the fire may be calculated as the

expected revenue that would have resulted by way of settlement or award from the clients' cases that plaintiff would have initiated during those 12 months; and it is further

ORDERED that defendant's seventh affirmative defense is dismissed; and it is further

ORDERED that defendants' cross-motion for summary judgment is denied; and it is further

ORDERED that an immediate trial of the issues of fact shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with the Clerk a note of issue and statement of readiness and shall pay the fee therefor, and the Clerk shall cause the matter to be placed upon the calendar for such trial.

DATED: 1/23/18

ENTER:

Andrea Masley J.S.C.
HON. ANDREA MASLEY