SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------X	**DCM Part 3**
ELITE CATERING COMPANY, INC.,	
	Present:
Plaintiff,	
	HON. PHILIP G. MINARDO
-against-	**DECISION AND ORDER**
NATIONAL SPECIALTY INSURANCE CO.,	**Index No. 101041/2013**
Defendant.	**Motion No: 2976-001**
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The following papers numbered 1 to 4 were fully submitted on the 10th day of November, 2016:

	Papers Numbered
Notice of Motion by Defendant for Summary Judgment (Affirmation, Affidavit and Memorandum of Law in Support) (Dated: July 15, 2016)	1
Plaintiff's Affirmation, Affidavit and Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (Dated: September 23, 2016)	2
Defendant's Reply Affirmation (Affidavits and Memorandum of Law in Support) (Dated: November 4, 2016)	3
Defendant's Supplemental Affirmation (Dated: November 11, 2016)	4

Upon the foregoing papers, the motion of defendant National Specialty Insurance Co. for summary judgment dismissing the complaint of plaintiff Elite Catering Company, Inc. is granted to the extent that plaintiff's second, third, fourth, fifth and sixth causes of action are hereby severed and dismissed; in all other respects the motion is denied.

This matter arises out of a claim by plaintiff Elite Catering, Inc. (hereinafter "Elite") for insurance proceeds purportedly due from its

insurer, National Specialty Insurance Co. (hereinafter "NSI"), pursuant to its general liability and commercial property policy (*see* Policy No. RCH700873-12, attached as Exhibit A to the July 13, 2016 Affidavit of John E. Prokop). As is pertinent, Elite claims to have suffered extensive property damage, food spoilage and loss of business income following Superstorm Sandy, which struck Staten Island on October 29, 2012.

It appears undisputed that plaintiff purchased the subject policy in connection with its catering business located at 1828A Hylan Boulevard, Staten Island, New York (hereinafter "the subject premises"). Said policy was effective from March 31, 2012 through March 31, 2013. To the extent relevant, Elite's principals, Lev Agarumov and Galina Bondar, concede that they intentionally declined to purchase a separate flood insurance policy, inasmuch as their establishment "was [located] two miles from the sea" (*see* May 23, 2014 EBT of Lev Agarumov, Defendant's Exhibit C, p. 28, ll 19-25). They did, however, purchase an additional (and costly) rider from NSI providing enhanced coverage for damages caused by sewer and drain back-ups, food spoilage, loss of business income, and power outages (*id.*, pp 99-102). It is uncontroverted that even before "Sandy" made landfall (*i.e.*, prior to the onset of any rain, wind or coastal surge) Consolidated Edison shut off electricity to the subject premises (*id.*, p. 98).

According to plaintiff, when its principals returned to the subject premises on the day after the storm, they found the restaurant to be

filled with refuse, including grease, sewage, fecal matter and toilet paper (*id.*, p. 64, ll 7-18). On November 1, 2012, plaintiff filed a claim with NSI for damages resulting from an apparent sewer back-up. However, six months later, plaintiff received a certified letter from NSI dated April 8, 2013 (*see* Exhibit B attached to July 13, 2016 affidavit of John E. Prokop), indicating that its claim had been denied on the ground that all of the alleged damages were the result of "flooding", a circumstance specifically excluded under their policy.

As a result of this denial, plaintiff commenced this action by the filing of a Summons and Complaint (*see* Defendant's Exhibit A) on June 11, 2013, seeking actual, incidental, consequential and, in its fourth cause of action, treble damages for: (1) breach of contract (its "First Cause of Action"); (2) breach of the covenant of good faith and fair dealing (its "Second Cause of Action"); (3) violation of General Business Law §349 (its "Third Cause of Action"); (4) common law fraud (its "Fourth Cause of Action"); (5) the statutory penalty for violating Insurance Law §4226 (its "Fifth Cause of Action"), and (6) breach of fiduciary duty (its "Sixth Cause of Action"). Defendant interposed an answer denying the material allegations of the complaint on or about August 21, 2013 (*see* partial Answer [pages 5, 6, 7 and 8 missing]; Defendant's Exhibit B). On May 23, 2014, plaintiff's principals were deposed, and the deposition of its insurance agent, Thomas Stanisci, a nonparty witness, was completed on June 30, 2014 (*see* Reply Affirmation of Mark L. Antin, Exhibit F).

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In moving for summary judgment and dismissal of the complaint, NSI maintains that (1) plaintiff's insurance policy clearly and unambiguously excluded coverage for flood damage, and (2) pursuant to its "anti-concurrent causation" language, the policy also unambiguously excluded coverage for **covered losses if those losses were occasioned, even in part, by uncovered causes**, *i.e.*, that damages caused by a combination of uncovered losses (*e.g.*, flood) and covered losses (*e.g.*, a sewer back-up) rendered the entire loss non-compensable. Accordingly, NSI claims that its disclaimer of coverage was justified on the ground that all of plaintiff's damages were indisputably caused, directly or indirectly, by the flooding brought on by Superstorm Sandy. In support, defendant attaches, *inter alia*, a copy of a post-*Sandy* flood map issued by the United States Geological Survey(*see* Defendant's Exhibit E), which purports to show that the entire area surrounding Elite's premises was inundated with flood waters as a result of the hurricane.

In opposition, plaintiff argues, *inter alia*, that all of its damages (*i.e.*, food spoilation, the loss of business income, clean-up and renovation costs) arose as a result of a sewer back-up for which plaintiff had purchased special coverage that more than doubled its original premium. Plaintiff further argues that its purchase of the additional coverage for sewer back-ups created a reasonable expectation on its part that damages attributable to the failure of the municipal sewer system would be covered (*see, e.g.*, EBT of Lev Agarumov, pp 98-101; Defendant's Exhibit C). Relative to the foregoing, a copy of the

EBT testimony of Elite's insurance agent, Thomas Stanisci, is annexed to support plaintiff's claim of confusion generated by the effect of the "anti-concurrent causation" exclusion on the rider providing additional coverage for damages attributable to, *e.g.*, sewer back-up. According to NSI, the former required denial of plaintiff's entire claim. Expressing his apparent confusion with that determination, plaintiff's agent testified that during a post-denial conversation with John Prokop, the "Vice President-Property of Risk Control Associates, Inc., third-party administrator for NSI", he asked: "Why were these things being denied? You know...we got backup of sewage and drains [and you say] it isn't covered. There's sewage in the restaurant. The power interruption, why [wasn't] that being addressed...[Also, there is] business interruption coverage...[and] contents [coverage]...[E]verywhere I turned to try to seek coverage was denied because it was deemed a flood." In addition, he complained that "Prokop wasn't [even] there to see the damage, so he couldn't speak for what was there or not there. I assume he referred to his notes with...his adjuster, but every time I questioned a different coverage part...[Prokop referred] back to [the lack of] flood [insurance]. When we got to the [coverage for] back-up of sewers and drains...[he] answer[ed]...that...*the sewer back-up was caused by the overloading of sewers because of flood water, and it wasn't going to be covered because it was deemed a flood"* (*see* June 30,

2014 EBT of Thomas Stanisci, Exhibit F of Defendant's Reply Affirmation, pp 66-67)[1].

Pertinent to defendant's motion to dismiss, it should be noted that plaintiff's demand for treble damages in its "Fourth" cause of action is untenable, as the allegations contained therein do not rise to the level of fraud evincing the high degree of moral turpitude necessary to warrant their imposition (*see* Rocanova v. Equitable Life Assur. Socy. of U.S., 83 NY2d 603, 613). "Punitive damages are available [only] where the conduct constituting, accompanying or associated with...[an alleged] breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available, and is sufficiently egregious...to warrant the additional imposition of exemplary damages. Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortuous conduct by which he was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally. Clearly, then, the standard for awarding punitive damages in first-party insurance actions is **a strict one**, and this extraordinary remedy will be available only in a limited number of instances" (*id.* [*citations and internal quotation marks omitted; emphasis supplied*). Likewise, plaintiff's demand for consequential damages, including attorneys' fees must be dismissed, as the action is predicated on the purported breach of an insurance contract action.

[1]Adding to the confusion, it appears from the agent's deposition testimony that plaintiff may never have been furnished with a copy of the complete policy (*see* p. 74, ll 13-25; p. 75, ll 1-3).

Absent a contract or policy provision to the contrary, "an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy" (Stein, LLC v. Lawyers Tit Ins. Corp., 100 AD3d 622, 623 [*citations and internal quotation marks omitted*]). Here, the Court has been directed to no such provision.

As for plaintiff's second and fourth causes of action, *i.e.*, for breach of the implied covenant of good faith and fair dealing, and for fraud, the complaint herein does not set forth the elements of bad faith or deception on the part of NSI that are essential to any allegation of a breach of the covenant of good faith and fair dealing (*see* Duration Mun. Fund L.P. v. JP Morgan Sec, Inc., 77 AD3d 474, 475; *see also* New York Univ. v. Continental Ins. Co., 87 NY2d 308), or the essential elements of a cause of action for fraud (*see* Channel Master Corp. v. Aluminum Ltd Sales Corp., 4 NY2d 403, 407).

Plaintiff's third cause of action, based on the alleged violation of General Business Law §349, must also be dismissed, as the complaint fails to allege that defendant's acts or practices were consumer-oriented or misleading in any material way (*see* Stutman v. Chemical Bank, 95 NY2d 24, 29). Private contract disputes unique to the parties themselves generally do not fall within the ambit of that statute (*see* New York Univ. v. Continental Ins. Co., 87 NY2d at 320).

Plaintiff's fifth cause of action, wherein is sought the statutory penalty for NSI's alleged breach of Insurance Law §2601, is likewise

subject to dismissal, as New York State does not recognize a private cause of action under that section of the Insurance Law (*see* Rocanova v. Equitable Life Assur. Soc. of U.S., 83 NY2d 603).

Finally, as for plaintiff's Sixth Cause of Action, *i.e.*, breach of fiduciary duty, it is the opinion of this Court that defendant has established, *prima facie*, the absence of any fiduciary relationship between itself and plaintiff (*see* Batas v. Prudential Ins. Co. of America, 281 AD2d 260). In opposition, the latter has failed to raise a triable issue of fact.

Nevertheless, defendant's motion for summary judgment must be denied as to plaintiff's first cause of action.

It is familiar law that summary judgment may be granted only when it is clear that no triable issues of fact exist (*see* Alvarez v. Prospect Hosp., 68 NY2d 320, 325). Accordingly, the initial burden of proof has been placed on the moving party to make a *prima facie* showing of its entitlement to judgment as a matter of law (*see* Zuckerman v. City of New York, 49 NY2d 557, 562; Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., 46 NY2d 1065, 1067). Should the movant fail to make the required showing, the motion will be denied without reference to the sufficiency of the opposing papers (*see* Ayotte v. Gervasio, 81 NY2d 1062, 1063). However, if the movant is successful, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a material issue of fact (*see* Alvarez v. Prospect Hosp., 68 NY2d at 324; Zuckerman v. City of New York, 49 NY2d

at 562). In making this determination, the court is enjoined to view the papers in the light most favorable to the party opposing the motion, to which is afforded the benefit of every possible favorable inference (*see* Martin v. Briggs, 235 AD2d 192, 196). Furthermore, while mere conclusions, unsubstantiated allegations, or expressions of hope have been held insufficient to defeat summary judgment (*see* Zuckerman v. City of New York, 49 NY2d at 562), the motion must nevertheless be denied if there is any doubt as to the existence of a triable issue of fact (*see* Rotuba Extruders, Inc. v. Ceppos, 46 NY2d 223, 231).

As to plaintiff's first cause of action, it has repeatedly been held by the courts of this state that "insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured" (Cragg v. Allstate Indem. Corp., 17 NY3d 118, 122). Accordingly, "exclusions from policy obligations must be in clear and unmistakable language, and if the terms of a policy are ambiguous, any ambiguity must be construed in favor of the insured and against the insurer" Oppenheimer AMT-Free Muns v. ACA Fin. Guar. Corp., 110 AD3d 280, 284, *citing* Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co., 12 NY3d 302, 307; White v. Continental Cas. Co., 9 NY3d 264, 267). In this regard, it is a long-standing rule that "the law governing the interpretation of exclusory clauses in insurance policies is highly favorable to insureds," and that "[w]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable

language...Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden...of establishing that the exclusion or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation" Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co., 12 NY3d at 307 [*internal quotation marks omitted*]).

Here, despite NSI's eventual submission of a full and complete copy of plaintiff's insurance policy (*see* Defendant's November 11, 2016 Supplemental Affirmation and attachments), this Court remains unable to find, as a matter of law, whether the facial inconsistency in policy language noted by plaintiff's insurance agent, *i.e.*, where the terms of a separately-purchased rider providing additional coverage for damages caused by, e.g., a sewer back-up, and the "anti-concurrent causation" exclusion upon which NSI relies, is subject to "no other reasonable interpretation, when read together [with the failure to purchase flood insurance], other than to exclude coverage for all losses caused by any combination of covered and non-covered occurrences", or represents, *e.g.*, a trap into which an "average insured" might fall as a result of the purchase of additional coverage specifically written to cover sewer and drain back-ups.

Accordingly, the issue at bar is not whether flood losses are properly excluded from coverage(which they clearly are), but whether the application of the "anti-concurrent causation" exclusion stated in the body of the policy, is, under the facts of this case, "consistent with

the reasonable expectations of the average insured" purchasing dedicated coverage for losses caused by, among other things, the failure of the municipal sewer system to keep up with climatic changes of whatever nature. In such circumstances, the law in this state provides that any ambiguity in policy language is to be construed in favor of the insured and against the insurer, and that the latter's intent to exclude specific coverage requires the use of "clear and unmistakable language...establishing that the exclusion or exemptions [upon which it purports to rely] are subject to no other reasonable interpretation" and are "consistent with the reasonable expectations" of a typical insured. For present purposes, however, it is sufficient to note that the language of the policy in question, when viewed as a whole, prevents this Court from finding as a matter of law, that defendant has demonstrated, *prima facie,* its right to dismissal of plaintiff's cause of action for breach of contract. Having failed to sustain this burden of proof, the summary dismissal of plaintiff's first cause of action is available to NSI regardless of the sufficiency of plaintiffs opposing papers. In any event, it remains to be proved whether the damages sustained by plaintiff were caused by (1) the failure of the sewer system or the power outage initiated by Con Edison in advance of the storm, (2) the storm itself, or (3) a combination of both (*cf*. LaCasa DiArtutro v. Tower Group Ins., 49 Misc3d 1209[A] [Sup Ct. NY Co 2015]). To resolve this issue, the testimony of experts, rather than the opinion of the parties' adjuster(s), would appear to be of immense value.

Alternatively, defendant has failed to conclusively rebut so much of the October 16, 2016 reply affidavit of Vice-President, John E. Prokop, wherein he opines that "[**i]t may well be** that flooding in the area overwhelmed the sewage system creating hydraulic pressure and a back-up of toilets and drains resulting in the discharge of fecal matter." Without the aid of experts, it may be impossible to determine with any certainty whether or not the circumstances described herein represent a covered failure of the sewer system under plaintiff's policy. Thus, defendant has failed to demonstrate as a matter of law that its disclaimer of coverage based on the policy's flood and anti-concurrent causation exclusion is justified.

Furthermore, the issue of the relative credibility of plaintiff's principals, their insurance agent and defendant's adjuster (*see* Reply Affidavit of Jeremy Miller), is for a jury to determine.

Accordingly, it is

ORDERED that the motion of defendant National Specialty Insurance Company for summary judgment dismissing the complaint of plaintiff Elite Catering Company, Inc. is granted with respect to plaintiff's second, third, fourth, fifth and sixth causes of action; and it is further

ORDERED that said causes of action are severed and dismissed; and it is further

ORDERED that, in all other respects, the motion is denied; and it is further

ORDERED that the Clerk enter judgment in accordance herewith.

E N T E R,

/s/ Philip G. Minardo
J.S.C.

Dated: Jan. 23, 2017