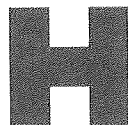


12 Misc.3d 1184(A), 824 N.Y.S.2d 763, 2005 WL 4257996 (N.Y.Sup.), 2005 N.Y. Slip Op. 52307(U)

## Unreported Disposition

(Cite as: 12 Misc.3d 1184(A), 2005 WL 4257996 (N.Y.Sup.))



(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, New York County, New York.  
J & R ELECTRONICS INC., Plaintiff,

v.

ONE BEACON INSURANCE COMPANY f/k/a  
Cgu Insurance Company and/or General Accident  
Insurance and/or General Accident Insurance Com-  
pany of America, Defendant.

No. 603284/2004.

Dec. 13, 2005.

KARLA MOSKOWITZ, J.

\*1 This is an insurance coverage dispute arising out of the tragic events of September 11, 2001. Plaintiff, J & R Electronics Inc. ("J & R"), filed this action against defendant, One Beacon Insurance Company, f/k/a CGU Insurance Company and/or General Accident Insurance and/or General Accident Insurance Company of America ("One Beacon"), alleging breach of a **business interruption** insurance policy. By this motion (sequence number 001), defendant moves, pursuant to CPLR 3212, to dismiss this lawsuit on the ground that it has already paid J & R for the very loss for which it seeks coverage. For the following reasons, the court grants the motion.

### FACTS

The facts of this case are not in dispute. Plaintiff J & R is a New York Corporation with its principal place of business at 23-27 Park Row, New York, New York. Defendant One Beacon is a Massachusetts corporation with its principal place of business at 1 Beacon Street, Boston, Massachusetts. One Beacon is-

sued an insurance Policy No. PPP0422329-03 to J & R with a Policy term of September 11, 1999 through September 11, 2001 (the "Policy"). The Policy covered J & R's various property interests, including those located at 23-27 Park Row, New York, NY. The Policy was in full force and effect on September 11, 2001.

As a result of the attack on the World Trade Center, J & R sustained damages to its property, a **loss of business income**, extra expenses and extended business income. J & R submitted a claim to One Beacon for its losses and damages. To date, One Beacon has paid J & R in excess of \$16,500,000.00 under the Policy. However, the plaintiff contends that One Beacon still owes it \$2,179,346.00 plus interest and costs.

The Policy provides "replacement cost coverage" that is, in essence, the cost to replace the damaged property with other property:

"7Valuation

"We will determine the value of Covered Property in the event of loss' as follows:

"a. At replacement cost (without deduction for depreciation as of the time of loss', except as provided in b., c., d., e., f., g., h., and I. below).

(See Affidavit of Paul MacDonald, sworn to March 14, 2005, Ex. B).

However, the insured paid an additional premium to receive coverage for damaged property at the selling price less unincurred expenses. (*Id.*, Ex. C). This coverage is additional because there is an assumption that a merchandiser's selling price is higher than the cost to replace damaged merchandise. (*Id.* ¶ 7). Accordingly, plaintiff submitted a claim for damaged

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merchandise under the business personal property section of the Policy. One Beacon adjusted plaintiff's business personal property loss and paid plaintiff, *inter alia*, \$9,942,541 for merchandise at the selling price. (*Id.* ¶ 8).

Plaintiff also submitted a claim for **loss of business income**. The "Business Income with Extra Expense" portion of the Policy provides:

"1. Business Income

"Business Income means the:

\*2 "a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and

"b. Continuing normal operating expenses incurred, including payroll.

\* \* \*

"4. Loss Determination

\* \* \*

"b. Resumption of Operations

"We will reduce the amount of your Business Income loss to the extent you can resume your operations', in whole or in part, by using:

"(1) Damaged or undamaged property (Including merchandise or stock) at the Described premises or elsewhere;

"(2) Any other available sources of material or outlets for your product.

One Beacon audited plaintiff's **loss of business income** claim and calculated plaintiff's gross lost sales at \$30,608,464.00. One Beacon then subtracted \$9,923,673.00 representing "Stock Value Paid" (*Id.* at 11). Plaintiff does not dispute that this represents the amount that One Beacon previously paid to plaintiff for damaged merchandise at the selling price. Nor does plaintiff dispute that this sum included loss of profits on that merchandise.

Plaintiff claims that, because it was deprived of the cash flow from the damaged goods, it suffered other business losses. For example, J & R contends that, because of lack of cash, it was unable to take advantage of lost promotional purchasing from Toshiba. (*See* Affidavit of Rachelle Friedman sworn to June 30, 2005 at ¶ 13). J & R also contends that as a result of loss of cash flow it had to reduce its advertising that hurt its sales. (*Id.* ¶¶ 14-15). J & R also claims that because of the depleted cash flow, it had to delay the opening of a new store devoted exclusively to the sale of cameras and camera equipment because there was not enough money to finish construction. (*Id.* at 16). J & R claims that its gross sales suffered \$1,555,001.00 as a result of not being able to open the camera store in November 2001. (*Id.* ¶ 17).

However, in apparent recognition that the Policy does not cover **consequential losses**, in the same breath, plaintiff states that "in identifying these losses, J & R is not asserting additional claims against One Beacon, but is merely identifying consequential damages suffered as a result of the loss to which it is not being compensated for ..." (Opp. Mem at 6). Plaintiff also admitted at oral argument that it could not claim these losses under the Policy. (Transcript of Oral Argument dated August 4, 2005 at 10).

Instead, plaintiff appears to argue that because One Beacon did not *preclude* recovery in the **business interruption** portion of the Policy for items the Policy also covers on a sales price basis, then J & R may make different claims for the same loss under both portions of the Policy. (See Opp. Mem at 11).

This is a nonsensical reading of the Policy. The Policy covers the insured for "loss." Once the insurance company covers that loss, the insured cannot again recover for the same damaged merchandise because a different section of the Policy may cover that same loss. J & R complains that then it received nothing for its payment of an additional premium to obtain coverage for damaged goods at the selling price that it has already received. This is not really the case. It is certainly possible for merchandise to suffer damage without J & R experiencing **business interruption** (for example if the goods incurred damage during shipping or if there was water damage). Under such circumstances, J & R would receive reimburse-

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ment for that damaged merchandise at the selling price precisely what it paid for. Therefore, J & R did not pay an illusory premium.

\*3 Accordingly, it is ORDERED that the motion of defendant One Beacon Insurance Company for summary judgment is granted as set forth in this Decision and Order; and it is further,

The Clerk is directed to enter judgment accordingly.

N.Y.Sup.,2005.

J&R Electronics Inc. v. One Beacon Ins. Co.

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