UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ACROPOLIS GARDENS REALTY CORP.,

Plaintiff,

– against –

DB INSURANCE CO. LTD,

Defendant.

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MEMORANDUM DECISION AND ORDER

23-CV-5251 (AMD) (CHK)

ANN M. DONNELLY, United States District Judge:

The plaintiff's action against the defendant insurance company arises out of the plaintiff's claims for flood damage to its properties. Before the Court is the defendant's motion for summary judgment on the breach of contract claim, the plaintiff's only remaining claim. For the reasons that follow, the motion is denied.

BACKGROUND

I. Factual Background

The plaintiff had an insurance agreement (the "Policy") with the defendant, with a policy period of January 4, 2021 through January 4, 2022. (ECF No. 48-23 at 8 (Certified Commercial Package Policy); ECF No. 50 (Defendant's Rule 56.1 statement with the plaintiff's responses ("Def. 56.1")) ¶ 1.) The Policy covered the plaintiff's 16 properties in Astoria, Queens, New York. (ECF No. 48-23 at 11; Def. 56.1 ¶¶ 2, 7.)

The Policy generally excluded coverage for flood damage. (*See* ECF No. 48-23 at 129–30.) However, it also included a "Flood Coverage Endorsement" that provided, in relevant part:

> The following is added to the Covered Causes Of Loss:

> Flood, meaning a general and temporary condition of partial or complete inundation of normally dry land areas due to:
>
> 1. The overflow of inland or tidal waters;
>
> 2. The unusual or rapid accumulation or runoff of surface waters from any source; or
>
> 3. Mudslides or mudflows which are caused by flooding as defined in C.2. above. For the purpose of this Covered Cause Of Loss, a mudslide or mudflow involves a river of liquid and flowing mud on the surface of normally dry land areas as when earth is carried by a current of water and deposited along the path of the current.
>
> All flooding in a continuous or protracted event will constitute a single flood.

(*Id.* at 140.) The Flood Coverage Endorsement also included an "Other Insurance" clause:

> If the loss is also covered under a National Flood Insurance Program (NFIP) policy, or if the property is eligible to be written under an NFIP policy but there is no such policy in effect, then we will pay only for the amount of loss in excess of the maximum limit that can be insured under that policy. This provision applies whether or not the maximum NFIP limit was obtained or maintained, and whether or not you can collect on the NFIP policy. We will not, under any circumstances, pay more than the applicable Limit of Insurance for Flood as stated in the Flood Coverage Schedule or the Declarations of this Coverage Part.
>
> However, this Provision I.1. does not apply under the following circumstances:
>
> a. At the time of loss, the property is eligible to be written under an NFIP policy but such policy is not in effect due solely to ineligibility of the property at the time this Flood Coverage Endorsement was written; or
>
> b. An NFIP policy is not in effect because we have agreed to write this Flood Coverage Endorsement without underlying NFIP coverage. There is such an agreement only if the Flood

> Coverage Schedule or the Declarations indicate that the Underlying Insurance Waiver applies.

(*Id.* at 143.)

On September 1, 2021, Hurricane Ida struck the New York area and caused flood damage to the plaintiff's properties. (Def. 56.1 ¶ 9; ECF No. 52-1 (Plaintiff's additional counterstatement of facts with the defendant's responses ("Pl. 56.1")) ¶ 9.)[1]

On September 2, 2021, the plaintiff submitted a Property Loss Notice. (Def. 56.1 ¶ 12.) The defendant assigned the claim to a "senior claim specialist" and retained an independent adjusting firm to adjust the plaintiff's claim. (Pl. 56.1 ¶¶ 15, 17.) On September 16, 2021, the defendant, through counsel, issued a reservation of rights letter. (Def. 56.1 ¶ 13.) On April 29, 2022, the plaintiff sent the defendant a proof of loss statement for $1,537,254.95. (ECF No. 48-19 (Statement in Proof of Loss).) In a May 12, 2022 letter, defense counsel rejected the proof of loss claim and requested additional information. (ECF No. 48-20 (May 12, 2022 Correspondence).) On June 29, 2022, the defendant acknowledged that it had received "limited information" from the plaintiff in response to its request; the defendant asked for additional information and to examine the plaintiff's representative under oath. (ECF No. 48-21 (June 29, 2022 Correspondence).)

Two of the plaintiff's representatives — the properties' superintendent and public adjuster — sat for examinations under oath. (*See* ECF No. 48-3; ECF No. 48-4.)[2] To date, the defendant has not paid the plaintiff's claim. (Pl. 56.1 ¶ 24.)

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[1] The plaintiff included an "Additional Counterstatement of Facts" with its counterstatement to the defendant's 56.1 statement. (*See* Def. 56.1 at 9–13.) The defendant included a counterstatement to these additional facts with its reply. (*See* Pl. 56.1.) References to paragraph numbers in this document are to the paragraphs that begin on page 9.

[2] The transcript of the properties' public adjuster's examination under oath is dated March 1, 2022 (*see* ECF No. 48-4), and the parties agree that the examination under oath happened on that date (*see* Def.

II. Procedural History

The plaintiff brought this action on June 14, 2023, in New York Supreme Court, Queens County. (ECF No. 1-1.) The defendant removed the case to this Court on July 10, 2023, invoking the Court's diversity jurisdiction. (ECF No. 1.)

On August 30, 2023, the plaintiff filed an amended complaint with claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive trade practices under New York General Business Law § 349. (ECF No. 13.) On September 29, 2023, the defendant moved to dismiss the breach of the implied covenant of good faith and fair dealing and New York General Business Law § 349 claims. (ECF No. 14.) On July 24, 2024, the Court granted the partial motion to dismiss, and held that the plaintiff's breach of contract claim would proceed. (ECF No. 22.) The defendant answered the amended complaint on September 3, 2024, and the parties proceeded to engage in discovery. (ECF No. 23.)

On January 23, 2026, the defendant moved for summary judgment on the breach of contract claim. (ECF No. 48.) The plaintiff opposes the motion. (ECF No. 49.)

LEGAL STANDARD

Summary judgment is appropriate if the parties' submissions — including pleadings, deposition transcripts, affidavits, and other material in the record — show that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). "A fact is material if it 'might affect the outcome of the suit under the governing law,'" and a factual dispute is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for

56.1 ¶ 23). However, the defendants also say that the examination under oath was on March 1, 2023. (ECF No. 48-28 at 10.)

the nonmoving party." *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The movant has the burden of demonstrating that "there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law." *Coyle v. United States*, 954 F.3d 146, 148 (2d Cir. 2020) (citation omitted).

A court "may find for the moving party 'only if [it] conclude[s] that on the record presented, considered in the light most favorable to the non-moving party, no reasonable fact-finder could find in its favor.'" *Roberts v. Genting N.Y. LLC*, 68 F.4th 81, 88 (2d Cir. 2023) (quoting *Capobianco v. City of N.Y.*, 422 F.3d 47, 54–55 (2d Cir. 2005)) (citation modified). A court does not consider whether "the evidence unmistakably favors one side or the other but whether a fair-minded fact-finder could return a verdict for the non-moving party on the evidence presented." *Id.* (quoting *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005)) (citation modified).

DISCUSSION

The defendant argues that "this matter presents a pure question of law to be resolved by the court" — whether "the terms of the 'Other Insurance' clause in the Flood Coverage Endorsement render[s] any potential coverage excess over the potential limits of an NFIP policy." (ECF No. 48-28 at 16–17.) The defendant argues that coverage was "not triggered" under the terms of the "Other Insurance" clause because "Plaintiff could have obtained coverage under an NFIP policy in the amount of $500,000 per building – which is more than Plaintiff's damages at each building." (*Id.* at 19.) In other words, the defendant claims that "[w]here the property is in a designated flood zone, as the Plaintiff's property is here, coverage does not kick in until the loss exceeds $500,000." (*Id.* at 21.)

The plaintiff disagrees with this interpretation of the Other Insurance clause. It "reads the endorsement to provide primary flood coverage subject to the stated deductible and to operate in excess where the loss would (or could) be covered by an NFIP policy." (ECF No. 49 at 4.) This reading, the plaintiff says, "gives effect to every provision and preserves the primary flood coverage for which Plaintiff paid." (*Id.* at 9.) The plaintiff argues in the alternative that the Other Insurance clause is ambiguous, that "any ambiguity in a coverage-limiting provision must be construed in favor of coverage," and that "if resolution of that ambiguity requires inquiry into the parties' intent, summary judgment is improper." (*Id.* at 10–11.)

Under New York law, insurance policies, "like any contract, must be interpreted according to the parties' intent." *Hester v. Navigators Ins. Co.*, 917 F. Supp. 2d 290, 296 (S.D.N.Y. 2013) (citing *Crane Co. v. Coltec Indus., Inc.*, 171 F.3d 733, 737 (2d Cir. 1999)).[3] Further, they must "be interpreted according to common speech and consistent with the reasonable expectation of the average insured." *Danaher Corp. v. Travelers Indem. Co.*, 414 F. Supp. 3d 436, 448 (S.D.N.Y. 2019) (quoting *In re Viking Pump, Inc.*, 52 N.E.3d 1144, 1151 (2016)). "[C]ourts 'must construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect.'" *Id.* (quoting *In re Viking Pump, Inc.*, 52 N.E.3d at 1151).

"When the parties' intent is clear — *i.e.*, unambiguous — the contract 'must be enforced according to the plain meaning of its terms.'" *Hester*, 917 F. Supp. 2d at 296 (quoting *Lockheed Martin Corp. v. Retail Holdings, N.V.*, 639 F.3d 63, 69 (2d Cir. 2011)). By contrast, "[a]n ambiguity exists where the terms of an insurance contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the

[3] The Court applies New York law. (*See* ECF No. 22 at 2 n.3.)

entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Fabozzi v. Lexington Ins. Co.*, 601 F.3d 88, 90 (2d Cir. 2010) (citation modified). "Where there are ambiguous terms in a policy, these 'must be construed in favor of the insured and against the insurer.'" *Silverman Neu, LLP v. Admiral Ins. Co.*, 933 F. Supp. 2d 463, 472 (E.D.N.Y. 2013) (quoting *White v. Cont'l Cas. Co.*, 878 N.E.2d 1019, 1021 (2007)). If a term in an insurance contract is "susceptible to at least two reasonable interpretations, summary judgment is inappropriate because the meaning of an ambiguous contract term is generally an issue of fact, requiring the trier of fact to determine the parties' intent." *Lepore v. Hartford Fire Ins. Co.*, 374 F. Supp. 3d 334, 343 (S.D.N.Y. 2019), *aff'd*, 800 F. App'x 29 (2d Cir. 2020) (citation modified).

Under the defendant's reading of the Other Insurance clause, the plaintiff is entitled to collect only if its damage exceeded $500,000 per building, regardless of whether an NFIP policy would have provided coverage. (*See* ECF No. 48-28 at 25.)[4] But this interpretation of the Other Insurance clause does not make sense in the context of the entire Flood Coverage Endorsement. The definition of "flood" in the Flood Coverage Endorsement is broader than the NFIP's definition; in the defendant's reading, if a policyholder with an NFIP policy sustained less than $500,000 in damage per building from a flooding event that did not meet the NFIP's definition of "flood," the policyholder would not be entitled to collect under the Policy even if the flooding event met the Flood Coverage Endorsement's definition of "flood."[5] "If an insurance policy is

[4] The parties do not dispute that the plaintiff could have purchased NFIP policies for each of the buildings that would have provided $500,000 in coverage per building, nor do they dispute that the repairs in this case did not cost more than $500,000 per building. (Def. 56.1 ¶¶ 37–38, 41.)

[5] The defendant concedes that the Policy "extends coverage for losses like business income or physical damage to Covered Property" resulting from "any Covered Cause of Loss," that the Flood Coverage Endorsement "expressly amends Covered Causes of Loss to include coverage for a 'Flood,'" and that "[h]ere, there is obviously direct physical damage to Covered Property." (ECF No. 48-28 at 17–18.)

ambiguous, all ambiguity must be resolved in favor of the policy holder in order to promote coverage for losses to which the policy relates." *Hartford Fire Ins. Co. v. Mitlof*, 208 F. Supp. 2d 407, 412 (S.D.N.Y. 2002) (citing *Kimmins Indus. Serv. Corp. v. Reliance Ins. Co.*, 19 F.3d 78, 81 (2d Cir. 1994)); *cf. Ins. Co. of N. Am. v. Zaglool*, 526 F. Supp. 2d 361, 368 (E.D.N.Y. 2007) ("Insurance policies are to be construed in favor of the insured and this rule is applied with particular diligence in construing the meaning of a warranty or exclusion from coverage.").

"The Court may not ignore context and custom in interpreting an agreement, and evidence of trade practice and custom may assist a court in determining whether a contract provision is ambiguous in the first instance." *Wells Fargo Bank, N.A. v. HoldCo Asset Mgmt., L.P.*, No. 16-CV-6356, 2017 WL 2963501, at *6 (S.D.N.Y. July 11, 2017) (citation modified), *aff'd*, 729 F. App'x 124 (2d Cir. 2018). As the plaintiff points out, the guidance from the International Risk Management Institute is that a Flood Coverage Endorsement "'wraps around' rather than 'follows' the NFIP policy," meaning that "the flood coverage endorsement applies on a first-dollar basis with respect to coverage that is provided under the commercial property policy to which it is attached but not provided under an NFIP policy." (ECF No. 49-2 at 5–6.)

The defendant relies on the language in the Other Insurance clause that says that it applies "whether or not you can collect on the NFIP policy." (*See* ECF No. 52 at 7.) But this language could apply in a case where, for example, a plaintiff could not collect under an NFIP policy because the plaintiff filed an untimely Proof of Loss related to its claim. *See, e.g.*, *Wing Bldg. Holding Co. LLC v. Standard Fire Ins. Co.*, No. 13-CV-1007, 2015 WL 631956, at *2–3 (N.D.N.Y. Feb. 13, 2015).[6] The bottom line is, at a minimum, that the Other Insurance clause is

[6] The defendant also cites *570 Smith St. Realty Corp. v Seneca Ins. Co., Inc.*, 2019 N.Y. Misc. Lexis 1773 (N.Y. Sup. Ct. 2014), in which the court examined a substantively identical provision and "discern[ed]

ambiguous and both parties' interpretations of the Other Insurance clause are reasonable. Accordingly, summary judgment is not appropriate.

The defendant argues that it is entitled to summary judgment even if the plaintiff's reading is correct, because "this event would have fallen within the scope of a flood as defined by the NFIP handbook." (ECF No. 52 at 11–12.) The parties agree that the NFIP defines "flood" as "[a] general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties (one of which is your property) from: a. Overflow of inland or tidal waters; b. Unusual and rapid accumulation or runoff of surface waters from any source; [or] c. Mudflow." (Pl. 56.1 ¶ 32.) They also agree that "to meet that definition, the acres must be continuous acres; parcels of land must touch." (*Id.* ¶ 33 (citation modified).) The parties dispute whether the flooding at the plaintiff's property meets this definition. (*See* ECF No. 49 at 14–15; ECF No. 52 at 9–12; *see also* ECF No. 48-28 at 26–30 (arguing that the event qualified as a "flood" as defined by the FEMA Flood Insurance Manual).) The defendant says that it is "self-evident" that "a massive storm which dropped seven inches of rain at Laguardia Airport; caused billions of dollars in damage; and resulted in 13 drowning deaths, produced generalized flooding conditions as defined by the NFIP handbook across New York City, including Queens." (ECF No. 52 at 9.) But this is a fact-intensive inquiry that cannot be resolved on a motion for summary judgment. Indeed, the parties' expert witnesses disagree about whether the "event" met the NFIP definition of "flood." (Pl. 56.1 ¶¶ 31, 36.) Accordingly, the defendant's motion for summary judgment is denied.

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no ambiguity." 2019 N.Y. Misc. Lexis 1773 at *13. But the parties in that action did not argue that the provision was ambiguous, *see id.*, and in any event, the decision is not binding on this Court.

CONCLUSION

For these reasons, the defendant's motion for summary judgment is denied.

SO ORDERED.

s/Ann M. Donnelly

ANN M. DONNELLY
United States District Judge

Dated: Brooklyn, New York
August 13, 2026