

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

FISKER AUTOMOTIVE, INC.,

Plaintiff,

-against-

XL INSURANCE AMERICA, INC.,

Defendant.

Index No.:

Date Purchased:

SUMMONS

JURY TRIAL REQUESTED

Plaintiff designates New York County as
the place of trial.

The basis of venue is the county designated
by Plaintiff pursuant to CPLR § 503(a).

To the above named Defendant,

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this
action and to serve a copy of your Answer within twenty (20) days after service of this
Summons, exclusive of the day of service, or within thirty (30) days after service is complete if
this Summons is not personally delivered to you within the State of New York. In case of your
failure to appear or answer, judgment will be taken against you by default for the relief
demanded in the Complaint.

SUPREME COURT OF THE STATE OF NEW YORK
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COMPLAINT

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Plaintiff Fisker Automotive, Inc. (“Fisker”), by its undersigned attorneys, and for its complaint against Defendant XL Insurance America Inc. (“XL”), alleges upon personal and corporate knowledge as to itself, its own conduct, and the conduct of its agents, and upon information and belief as to all other matters, as follows:

NATURE OF THE ACTION

1. This is a civil action brought by Fisker for breach of contract and a declaration of coverage based on XL’s failure to honor its commitments under Policy No. US00012156PR12A (“the Policy”) to reimburse Fisker for losses it suffered as a result of the destruction of Fisker’s merchandise in the Named Storm referred to as “Superstorm Sandy.” On October 29, 2012, Fisker lost 338 Fisker Karma extended range hybrid-electric luxury sedans, valued at approximately \$33 million, at a transshipment facility in Port Newark, New Jersey, where they had been unloaded from ocean vessels for transshipment to conveyances for delivery to retail dealers at various points within the United States. The vehicles were submerged in more than five feet of seawater, resulting in their complete destruction.

2. On November 13, 2012, Fisker notified XL of the loss. Fisker filed its proof of loss with XL on December 3, 2012, and met with XL’s adjusters and claims representatives to ensure that all of their information requests were fulfilled in their entirety. On December 18, 2012, XL’s adjuster acknowledged that all of XL’s information requests had been met.

Nevertheless, on December 20, 2012, XL provided Fisker with written notice that it was denying coverage of the claim.

3. XL's refusal to perform its obligations under the Policy has forced Fisker to bring the instant lawsuit. Accordingly, Fisker seeks damages for breach of contract and specific performance of XL's obligations under the Policy, a declaration concerning the fact of coverage and the extent of coverage available under the Policy, an award of its attorney fees and costs in bringing this action, and such other relief as this Court deems just and proper.

THE PARTIES

4. Plaintiff Fisker Automotive, Inc. is a corporation organized under the laws of Delaware with its headquarters in Anaheim, California. Fisker is in the business of designing, manufacturing and marketing extended-range hybrid electric vehicles. As part of its business, Fisker subcontracts for the assembly of vehicles at a facility operated by a non-affiliated company, Valmet Automotive, Inc., in Finland. The assembled vehicles are shipped by ocean transport to a transshipment facility operated in Port Newark, New Jersey, by FAPS, Inc., another non-affiliated company, for transshipment to land conveyances for distribution to retail dealers at various points within the United States.

5. Defendant XL America Insurance, Inc. is a corporation organized under the laws of Delaware, with its principal place of business in Connecticut. XL sold Policy No. US00012156PR12A to Fisker, providing coverage for property damage and losses in transit.

JURISDICTION AND VENUE

6. This matter falls within this Court's general original jurisdiction pursuant to Judiciary Law § 140-b and Article VI, § 7 of the New York Constitution.

7. This Court has personal jurisdiction over XL pursuant to N.Y. C.P.L.R. §§ 302(a) and 311. At all times relevant herein, XL transacted business within the State of New York and contracted to provide services within this State by insuring risks in New York. Additionally, XL expressly agreed in the Policy to submit to the jurisdiction of this Court.

8. Venue in this Court is proper pursuant to N.Y. C.P.L.R. § 503(a) inasmuch as the corporate parties' principal places of business are outside the State of New York.

FACTUAL BACKGROUND

I. THE UNDERLYING LOSS

9. Fisker arranged for the ocean transportation of vehicles assembled by its subcontractor in Finland to the FAPS, Inc. transshipment facility in Port Newark, New Jersey. The FAPS facility includes a marine vessel slip, large parking areas for vehicles awaiting transfer to inland transport, and repair and service facilities to address service requirements and perform final preparation, as necessary, before vehicles are transferred to inland conveyances. The Fisker Karma vehicles that were destroyed in Superstorm Sandy were included in 21 separate shipments from Europe to Port Newark, prior to October 29, 2012.

10. Although more than 900 other Fisker vehicles from the same ocean shipments previously had been transshipped to inland conveyances through FAPS, the 338 vehicles remaining in port were delayed to address various service requirements. All or virtually all of the vehicles were subject to a safety recall requiring the replacement of cooling fans before they could be distributed lawfully to retail dealerships. In addition, some of the vehicles required replacement of lithium ion batteries and software updates. These requirements resulted in delays of varying lengths in transshipping the vehicles to dealers via domestic conveyances.

11. On October 29, 2012, the storm surge from Superstorm Sandy struck while the vehicles were awaiting service and transshipment at FAPS. The storm resulted in a flood that inundated the FAPS facility. The Fisker vehicles were submerged to a depth of at least five feet in seawater. All of the vehicles were rendered unsalable. After the waters receded, a 12-volt control unit in one of the cars caught fire, further damaging some of the vehicles, although they already had been damaged beyond repair. The total retail value of the vehicles that were destroyed was approximately \$33 million.

II. THE XL INSURANCE POLICY

Insuring Agreements and Nature of Coverage

12. In exchange for \$268,846.00 in premiums, which Fisker duly paid, XL issued to Fisker Policy No. US00012156PR12A, effective from July 19, 2012 through July 19, 2013. The Policy provides varying limits of coverage depending on the circumstances of the loss, as more fully described below, but is subject to an overall limit of \$100,000,000 per occurrence. The Policy was valid at the time it was sold and remains in full force and effect. A copy of the Policy is attached hereto as Exhibit A and incorporated herein by reference.

13. The Insuring Agreement of the Policy insures Fisker against “direct physical loss of, or direct physical damage to, first-party property ...” Policy, Ex. A at 10 of 50. In the Insuring Agreement, XL undertakes to pay Fisker, after the satisfaction of all requirements and subject to all deductibles and limits, for “Damage during the Policy Term to Insured Property at Insured Premises directly and proximately caused by an Insured Cause of Loss.” *Id.* “Insured Premises,” as the schedule of sublimits in the Policy Declarations makes clear, includes “Locations” scheduled in the policyholder’s application, “newly acquired Locations,” or “Unnamed/Unreported Locations.” *See id.*, Ex. A at 3-4 of 50. Such coverage is referenced herein as the “Premises Coverage.”

14. While the language in the Insuring Agreement is limited to damage at “Insured Premises,” Paragraph I.E of the Physical Property Section of the Policy extends coverage to losses in Transit, which include:

Damage to personal property included within Insured Property, while in transit within the Territory [including the United States] ... from the time the property is moved for the purpose of loading and continuously thereafter while awaiting and during loading and unloading and in temporary storage ... including during deviation and delay, until safely delivered and accepted at place of final destination.

Id., Ex. A at 11 of 50. Such coverage is referenced herein as the “Transit Coverage.”

15. Paragraph II.T of the Physical Property Section further clarifies the time that Transit Coverage under the Policy becomes effective in circumstances involving transfer of goods from vessels to land conveyances at points of transshipment such as FAPS. Under Paragraph II.T, the Policy excludes an import shipment from coverage until the later of two events occurs:

- (a) The shipment is unloaded from the importing vessel or conveyance;
or
- (b) Coverage under an ocean marine or other insurance policy covering the shipment ends.

Id., Ex. A at 13 of 50.

16. Paragraph I.N of the Definitions Section defines an insured “Occurrence” as “the physical source of Damage to Insured Property, regardless of whether it creates more than one Insured Cause of Loss.” *Id.*, Ex. A at 39 of 50. The Policy specifies that “[o]ne occurrence is the aggregate amount of all fully adjusted claims covered under this policy that arise from that physical source.” *Id.* It specifies that “[a]n Occurrence for Flood is the sum total of all Damage ... insured hereunder sustained during any period of seventy-two (72) consecutive hours by reason of Flood,” and that “[a]n Occurrence for Named Storm or Windstorm is the sum total of all Damage ... insured hereunder arising out of or caused by the same atmospheric disturbance during any period of seventy-two (72) consecutive hours.” *Id.*, Ex. A at 39-40 of 50.

Limits of Coverage Potentially Applicable to the Loss

17. Paragraph F of the Commercial Property Insurance Declarations Section provides that the limits of coverage available for any one Occurrence are \$100,000,000, subject to a deductible and any applicable sublimits that may apply. *Id.*, Ex. A at 2 of 50.

18. The Premises and Transit provisions of the Policy are not stated as separate coverage parts with discrete limits of coverage. Rather, there is a single Insuring Agreement with a Transit extension, and the Policy has one overall Occurrence Limit of \$100,000,000, subject to sublimits. *Id.*, Ex. A at 10-11 of 50.

19. Paragraph G of the Commercial Property Insurance Declarations provides a lengthy schedule of sublimits that may be applicable to a loss, depending on the circumstances of the loss. *Id.*, Ex. A at 2-3 of 50. Sublimits that are potentially applicable to the instant claim include:

- (a) **“Flood”** – varying sublimits, including:
 - i. \$10,000,000 in a “High Hazard Flood Zone”;
 - ii. \$30,000,000 in a “Moderate Hazard Flood Zone”;
 - iii. \$5,000,000 at “newly acquired Locations”;
 - iv. \$2,500,000 at “Unnamed/Unreported Locations,” “except no coverage is provided for Locations in High Hazard Flood Zones”; and
 - v. \$1,000,000 for “errors and omissions.”
- (b) **“Named Storm”** is specified as “Included,” meaning that the sublimit is coextensive with the Policy’s overall Occurrence limit of \$100,000,000. However, the provision specifies the following additional sublimits:
 - i. \$5,000,000 at “newly acquired Locations,” “except no coverage is provided for High Hazard Wind Zones”;
 - ii. \$2,500,000 at “Unnamed/Unreported Locations,” “except no coverage is provided for Locations in High Hazard Wind Zones”; and
 - iii. \$1,000,000 for “errors and omissions.”
- (c) **“Transit”** is subject to a distinct sublimit of \$5,000,000.
- (d) **“Unnamed/Unreported Locations”** are subject to a distinct sublimit of \$2,500,000.

Id., Ex. A at 2-3 of 50.

20. Paragraph IV.C of the Definitions Section defines a “Flood,” in relevant part, as “[a] temporary condition of partial or complete inundation of normally dry land areas from ...

[t]he overflow of inland or tidal waters; ...[w]ave action, force of water (whether wind driven or not), storm surge, Named Storm, tsunami or the release of impounded water” *Id.*, Ex. A at 46 of 50.

21. Paragraph IV.D of the Definitions Section defines a “Named Storm,” in relevant part, as “a weather or atmospheric condition that has been declared as a hurricane, typhoon, tropical storm or cyclone by the U.S. National Weather Service, World Meteorological Organization, Australia Bureau of Meteorology, Philippine Atmospheric, Geophysical & Astronomical Services Administration, the Seychelles Meteorological Service or a similar weather organization.” *Id.*, Ex. A at 46 of 50.

22. Paragraph I.M of the Definitions Section defines “Location(s)” as “Insured Premises made up of an insured building or group of buildings situated at a common place, including machinery and equipment, related structures and the contents of such buildings or structures, or on land within one thousand (1000) feet thereof.” *Id.*, Ex. A at 39 of 50.

23. Paragraph I.T of the Definitions Section specifies, among other things, that “Unnamed/Unreported Locations” “do not include any property in transit.” *Id.*, Ex. A at 41 of 50.

24. Paragraph G of the Commercial Property Insurance Declarations provides detailed instructions for reconciling the sublimits of the Policy. *Id.*, Ex. A at 2 of 50. Specifically, Paragraph G provides that when more than one sublimit is applicable:

- (a) In general, sublimits may be “cumulated,” or combined to allow larger limits of coverage for a loss;
- (b) However, when the sublimit is a “peril” (a Named Storm, a Flood, or Earth Movement), the limits do not cumulate, but the sublimit stated in the schedule for that “peril” is the maximum amount the policy will pay; and
- (c) If more than one “peril” applies—an “initiating peril” and a “resulting peril” (such as a Named Storm that causes a Flood)—the policy provides coverage not exceeding the greater of the two sublimits.

Id., Ex. A at 2 of 50.

25. For purposes of calculating the applicable sublimit in the event that more than one “peril” applies, the Policy specifies the following calculation:

- (a) The sublimit for the resulting peril is applied first.
- (b) The amount of that sublimit is subtracted from the sublimit for the initiating peril.
- (c) The portion of the sublimit of the initiating peril that remains after this operation is then added to the sublimit of the resulting peril to calculate the overall available limit.

Id., Ex. A at 2 of 50.

26. For example, under this method of calculation, if a Named Storm (\$100,000,000 sublimit) initiates a Flood within a High Hazard Flood Zone (\$10,000,000 sublimit), the Insured is entitled to \$100,000,000 in coverage.

27. Further, where a Flood results from a Named Storm, it does not matter whether the loss occurred within a High Hazard Flood Zone or a Moderate Hazard Flood Zone. Using the method of calculation specified in the policy, the limits available for the loss in either case will be the full amount available for the initiating peril, the Named Storm (\$100,000,000).

28. A number of the sublimits listed in the schedule are modified by the following italicized text: “*This coverage may be further sublimited elsewhere for certain perils.*” Examples of sublimits that are so modified include distinct sublimits for “errors and omissions,” “newly acquired Locations,” “off-premises service interruption,” and “Unnamed/Unreported Locations.” *Id.*, Ex. A at 3-4 of 50.

29. The sublimits for Named Storm and Flood are not modified by the statement, “*This coverage may be further sublimited elsewhere for certain perils.*” *Id.*, Ex. A at 3 of 50.

30. Nowhere does the Policy provide that whenever more than one sublimit is potentially applicable to a loss, all sublimits are to be applied, or that recovery is necessarily limited to the smallest sublimit.

III. THE CLAIM

31. Superstorm Sandy was declared a tropical storm by the United States Weather Service on October 22, 2012, and was therefore a “Named Storm” within the meaning of the Policy. It was upgraded to a hurricane (also a Named Storm) on October 24, 2012.

32. The storm surge from Superstorm Sandy reached the New York/New Jersey area on October 29, 2012, resulting in widespread flooding, including flooding of the FAPS facility in Port Newark.

33. The FAPS facility was not a “Location” within the meaning of the Policy because it was not insured by XL. *See* Ex. A at 39 of 50. Because it was not a “Location,” it was not an “Unnamed/Unreported Location” within the meaning of the Policy. *See id.*, Ex. A at 41 of 50.

34. The Fisker vehicles that were destroyed in Superstorm Sandy were in transit to final destinations at retail dealerships in the United States.

35. The vehicles had been unloaded at various times from various ocean vessels at FAPS for the purpose of final preparation, as necessary, and for loading onto land conveyances for continued shipment to their final destinations.

36. At the time the loss occurred, the vehicles were no longer within the coverage of ocean marine insurance covering their voyage into the United States.

37. FAPS is a transshipment facility, and delivery of the vehicles into the FAPS facility constituted “movement for the purpose of loading” onto conveyances for further transport to final dealer destinations in the United States, within the meaning of the Policy. Accordingly, the Transit coverage of the Policy extended to the vehicles at the time of the loss. *See* Ex. A at 11 of 50.

38. Because of the recall which required replacement of cooling fans before the vehicles could legally be delivered to dealers, as well as other service requirements, the vehicles were subject to “deviation and delay” within the meaning of the Policy before final shipment from the transshipment facility to the dealerships could be effected.

39. The vehicles were destroyed by a Flood which resulted from a Named Storm within the meaning of the Policy.

FIRST CLAIM FOR RELIEF
(BREACH OF CONTRACT; SPECIFIC PERFORMANCE)

40. Plaintiff repeats and incorporates by reference the allegations in Paragraphs 1 through 39.

41. Plaintiff has suffered a Transit loss within the coverage of the Policy, inasmuch as Plaintiff has suffered “Damage to personal property included within Insured Property, while in transit within the Territory,” which includes the United States, occurring from the time the property was discharged from an ocean vessel at the Port of Newark for transshipment on land conveyances and was thus “moved for the purpose of loading ... including deviation and delay, until safely delivered and accepted at place of final destination.”

42. The Policy is a valid and enforceable contract providing insurance coverage for the loss suffered by the Plaintiff.

43. XL has been given timely notice of the loss, and all other conditions of the Policy, including but not limited to payment of premium, proof of loss, and full cooperation, have been satisfied.

44. Accordingly, XL’s contractual duty to indemnify Plaintiff for the value of the loss has been triggered.

44. Notwithstanding Plaintiff’s express request for coverage, XL has denied the claim and has not tendered any payment to Plaintiff.

45. XL’s failure and refusal to make payments due under the Policy constitute a breach of the Policy.

46. As a direct and proximate result of XL’s breach of the Policy, Plaintiff is suffering damages equal to the sums it would be entitled to recover as benefits under the Policy.

47. For breach of the contract Plaintiff prays entry of judgment awarding specific performance and the payment of damages in an amount equal to the amount owed under the Policy, to be proven at trial.

SECOND CLAIM FOR RELIEF
(DECLARATION OF COVERAGE AND OF APPLICABLE LIMITS)

48. Plaintiff repeats and incorporates by reference the allegations in Paragraphs 1 through 47.

49. The Policy obliges XL to cover losses in Transit as and to the extent set forth in Paragraphs 14 and 17-30.

50. The losses alleged herein constitute losses in Transit within the meaning of the Policy.

51. The losses alleged herein constitute losses due to a Flood that resulted from a Named Storm within the meaning of the Policy.

52. The Policy provides up to \$100,000,000 in coverage for losses resulting from a Named Storm. No smaller sublimit within the Named Storm provision of the Policy is applicable. *See* Ex. A at 3 of 50.

53. The Policy provides up to \$50,000,000 in coverage for losses resulting from a Flood. *See id.*

54. When a loss results from a Flood caused by a Named Storm, the Policy provides coverage up to highest available sublimit, as set out in Paragraphs 25-27. In this instance, the highest available sublimit is that for a Named Storm, or \$100,000,000.

55. Unlike other sublimits stated in the Policy, the provisions setting out the sublimits for Named Storm and for Flood do not provide that they “may be further sublimited.” Accordingly, losses stemming from these perils may not be further sublimited.

56. Plaintiff is entitled to a declaration from this Court that: (a) the Policy covers the loss alleged herein; and (b) the extent of the coverage available for the loss, which occurred because of a Flood resulting from a Named Storm, is \$100,000,000, which amount may not be further sublimited under the Policy.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief against XL, as follows:

A. With respect to the First Claim for Relief, for a judgment against XL that it is in breach of contract, awarding direct damages sustained by Plaintiff as a result of XL's breach of its contractual duties in an amount to be proven at trial, plus pre- and post-judgment interest, and ordering specific performance of the remaining Policy terms; and

B. With respect to the Second Claim for Relief, for a declaration by the Court that the Policy covers the Plaintiff's loss, and that the extent of the coverage available for the loss, which occurred because of a Flood resulting from a Named Storm, is \$100,000,000, which amount may not be further sublimited under the Policy; and

C. With respect to both Claims for Relief, for a judgment awarding Plaintiff its reasonable attorney fees and costs incurred in prosecuting this action, together with such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby respectfully demands a jury trial for all of the claims asserted in the Complaint that are triable to a jury.

