SUPERIOR COURT OF NEW JERSEY

TRAVIS L. FRANCIS
ASSIGNMENT JUDGE

MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903-0964

October 29, 2014

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Re: Wakefern Food Corp., et als v. Lexington Insurance Co.
Docket No. L-6483-13

Dear Counsel:

Enclosed herein please find my decision of this date regarding the above-captioned case together with Order consistent with this decision.

Very truly yours,

Travis L. Francis, A.J.S.C.

TLF/dg
Enclosure

If you require any accommodations as a result of a disability, please call 732-519-3638

Honorable Travis L. Francis, A.J.S.C.
Middlesex County Courthouse
56 Paterson Street
Post Office Box 964
New Brunswick, New Jersey 08903-0964

****

WAKEFERN FOOD CORP., et als	:	SUPERIOR COURT OF NJ
Plaintiffs	:	LAW DIVISION
vs.	:	MIDDLESEX COUNTY
LEXINGTON INSURANCE COMPANY,	:	DOCKET NO. L-6483-13
Defendant	:	

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Synopsis

This insurance coverage dispute is before the court pursuant to Plaintiff Wakefern Food Corp's ("Wakefern") and Defendant Lexington Insurance Company's ("Lexington") cross motions for summary judgment based on losses sustained in the wake of Superstorm Sandy. The

nub of the issue is the interpretation and application of specific policy deductibles.

Plaintiff seeks by way of summary judgment a determination that as a matter of law, the "Named Storm" deductible does not apply to their storm related losses. Secondarily, Plaintiff seeks a determination as a matter of law, if the court determines that the Named Storm deductible does apply, that in calculating said deductible the Total Insurable Values or "TIV" only applies to the property included in the loss, up to a sublimit of $150 million dollars set forth in Sec. I (E) of the policy captioned "Coverages and Limits of Liability." Plaintiff contends that the 2% deductible cannot exceed $3 million dollars. Additionally, Plaintiff asserts that their losses due to spoilage are not impacted by the Named Storm deductible.

Defendant on the other hand contends that the Named Storm deductible does apply and that as a matter of law, the total insurable value is based on the Statement of

Values ("SOV") provided by the insured. The SOV adjusts based on appreciation/depreciation.

Undisputed Facts

Wakefern is a buying cooperative of owners/operators of Shoprite and PriceRite supermarkets that purchased commercial property insurance from Defendant Lexington Insurance Co. ("Lexington Policy"). As a result of Superstorm Sandy, Wakefern claimed over $50 million in losses of which Plaintiff paid approximately $22 million.

It is undisputed that the policy's Spoilage deductible is 10% of loss with a $100,000 minimum claim for warehouse locations and $25,000 minimum claim for non-warehouse locations. *Lexington Policy* § I (G). It is also undisputed that the wind and hail coverage includes a $250,000 per Occurrence deductible except as contained in subsection (2) of the policy, which provides for a "2% [deductible] of Total Insurable Values at the time of the loss at each location involved in the loss or damage arising out of a Named Storm . . . subject to

a minimum deductible of $250,000 for any one Occurrence." *Lexington Policy* § I (G)(3)(2). The Policy defines a Named Storm as "a storm that has been declared by the National Weather Service to be a Hurricane, Typhoon, Tropical Cyclone, Tropical Storm or Tropical Depression." *Lexington Policy* § I (E). As calculated by Defendant, the Named Storm deductible was considerably greater than the deductible for spoilage.

The deductible provisions further provide "If two or more deductible amounts provided in this Policy apply to a single Occurrence, the total to be deducted shall not exceed the largest deductible applicable unless otherwise stated in this Policy." Additionally, "[w]hen this Policy covers more than one Location, the deductible shall apply against the total loss or damage covered by this Policy in any one Occurrence, unless otherwise stated in Paragraph G." *Id.* at § I (G).

ARGUMENTS

Wakefern asserts that Superstorm Sandy was not a Named Storm by definition, when it hit New Jersey. Alternatively Wakefern contends, if the Named Storm deductible does apply, it is limited to wind and hail losses and cannot be applied to the more specific spoilage losses. Wakefern also concludes that the Total Insurable Values ("TIV") referenced in the Named Storm deductible can only include the actual value of property "involved in the loss or damage" and that the TIV would not incorporate the real property value as Lexington contends. *Lexington Policy* § I (G)(3)(2).

Conversely Lexington argues for the application of the Named Storm deductible, contending that the damage asserted in the claim *arose out of* Hurricane Sandy and therefore is subject to the deductible [emphasis added]. Defendant asserts the Named Storm deductible trumps any lesser deductible by the clear language of the contract and that the parties understood the meaning of "Total Insurable Values" when the contract was executed.

I.

Plaintiff asserts that the Lexington Policy defines "Named Storm" as "a storm that has been declared by the National Weather Service to be a Hurricane, Typhoon, Tropical Cyclone, or Tropical Depression" and that when the storm hit New Jersey at approximately 8:00 PM EDT on October 29, 2012, the storm was not declared any of said weather events. Plaintiff notes that as of 5:00 PM EDT October 29, 2012, the storm was already "expected to transition into a frontal or wintertime low pressure system shortly." (*Pl.'s Cert.*, Ex. 11.) Plaintiff contends that by 7:00 PM EDT, the National Weather Service's National Hurricane Center (NHC) had declared the storm a "Post-Tropical Cyclone." (*Pl.'s Cert.*, Ex. 13.) Plaintiff argues, a "Post-Tropical Cyclone," is defined in the Glossary of NHC Terms as its own weather event and that a Post-Tropical Cyclone is a "former tropical cyclone," not a "Hurricane, Typhoon, Tropical Cyclone, Tropical Storm or Tropical Depression."

Plaintiff argues that no amount of discovery will change the fact that the NHC declared the storm a "Post-Tropical Cyclone" well before Plaintiff's losses occurred.

In support of their assertions, Plaintiff refers to the days after the storm when the governor issued Executive Order No. 107, which precluded insurers from applying hurricane deductibles to claims. (*Pl.'s Cert.*, Ex. 15.) Plaintiff contends that the governor's Order recognized that "the National Weather Service categorized Sandy as a post-tropical storm." (*Pl.'s Cert.*, 2.)

In response, Defendant contends that the Named Storm deductible applies to all losses at issue. Defendant asserts that while Plaintiff argues that Sandy was a "post-tropical cyclone" beginning at 7:00 PM EDT, Plaintiff's claim consists of losses that began before 7:00 PM while Sandy was a hurricane. Defendant argues that its cross-motion for summary judgment should be granted with respect to all locations that began to sustain losses before 7:00 PM. (*See Def.'s Cert.*, Ex. 12, 13, 14, 15, 16.)

Defendant asserts that it is undisputed that "Hurricane" Sandy was a Named Storm on October 29, 2012 prior to 7:00 PM and that the only question is whether each of Plaintiff's claimed locations was involved in loss or damage "arising out of" Hurricane Sandy.

Defendant asserts summary judgment is also appropriate for locations that sustained losses *after* 7:00 PM, given the broad construction of the "arising out of" policy language. Defendant argues that in New Jersey, the phrase "arising out of" in an insurance policy is given an encompassing meaning: "the phrase arising out of has been defined broadly . . . to mean conduct 'originating from,' 'growing out of,' or having a 'substantial nexus' with the activity for which coverage is provided." *Am. Motorists Ins. Co. v. L-C-A Sales Co.*, 155 *N.J.* 29, 35 (1998). Defendant refutes Plaintiff's assertion that Sandy was not a Named Storm "when it hit." Defendant contends Plaintiff erroneously refers to the center of the cyclone and that other portions of the

cyclone had reached land hours earlier, while the storm was a hurricane.

Defendant asserts that a loss *arises out of* a Named Storm so long as the Named Storm has a "substantial nexus" to the loss and that the losses Plaintiff incurred would not have occurred but for Hurricane Sandy.

Defendant asserts Executive Order No. 107 applied solely to homeowners' insurance claims wherein statewide uniform policy language determines the applicability of a hurricane deductible. Defendant asserts that respecting commercial insurance, there is no uniform hurricane deductible language.

II.

Plaintiff argues the Named Storm deductible cannot apply to Plaintiff's spoilage losses because the Named Storm deductible is a subpart under the wind and hail provision. Plaintiff asserts that the Named Storm Deductible would strictly apply to wind and hail losses

that Lexington can prove were caused exclusively by a hurricane, typhoon, tropical cyclone, tropical storm or tropical depression.

Plaintiff asserts that they sought and obtained insurance coverage specifically for food spoilage losses resulting from all covered perils (including flood, service interruption, equipment breakdown, wind, etc.). Plaintiff argues that when interpreting a contract, the language therein must be liberally construed in favor of the policyholder and, if doubtful, uncertain or ambiguous, or reasonably susceptible of two interpretations, the construction conferring coverage should be adopted. *Simonetti v. Selective Ins. Co.*, 372 *N.J. Super.* 421, 430 (App. Div. 2004) ("to the extent the policy terms at issue are ambiguous, long-accepted principles of interpretation applicable to insurance contracts require us to construe this policy language against the drafter, in favor of the insured, and in accordance with the insured's reasonable expectations."). Plaintiff argues that Lexington's "All

Risk" policy contains a specific deductible relating to spoilage losses without limitation on the type of peril that must cause said losses for the deductible to apply. Plaintiff therefore contends, as a matter of law, this specific deductible provision should apply to all spoilage losses.

Defendant conversely argues that the Spoilage deductible identifies the type of damage to which it applies, however, the Named Storm deductible is more specific as to the type of peril to which it applies, namely losses "arising out of" a Named Storm. Defendant asserts that unlike the Spoilage deductible, the Named Storm deductible addresses situations where a claim involves other coverages and applies "regardless of the number of . . . Coverages involved." Lexington Policy § I (G)(3)(2).

Plaintiff responds that whether or not Plaintiff's loss of "perishable goods" arose out of a "Named Storm," the last cause in the causal chain leading to the loss was "spoilage," a separate, additional coverage.

Plaintiff urges that New Jersey has adopted "Appleman's Rule," providing that coverage is determined by the first or last cause in a chain of causation for first-party coverage. The Supreme Court has held that where multiple causes contribute sequentially to a loss, as long as the first or last cause is covered, there is coverage for the entire loss. See *Flomerfelt v. Cardiello*, 202 *N.J.* 432, 447 (2010) ("In situations in which multiple events, one of which is covered, occur sequentially in a chain of causation to produce a loss, we have adopted the approach known as 'Appleman's Rule' . . . .which provides that 'recovery may be allowed where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or where the insured risk itself set into operation a chain of causation in which the last step may be an excepted risk.'" *5 Appleman, Insurance Law and Practice*, § 3083 at 309-311 (1970)). Plaintiff contends that New Jersey courts have applied Appleman's Rule where policy language purports to exclude losses *arising out of* certain causes.

EDP v. Am. Home Assurance Co., 267 *N.J. Super.* 537, 540-41 (App. Div. 1993). Plaintiff asserts that even if the Named Storm Deductible somehow applied, under Appleman's Rule, the last cause in the causal chain leading to Wakefern's spoilage loss is covered under the separate Spoilage section in the Policy.

Plaintiff asserts that as applied by Defendant, the Named Storm deductible is effectively an exclusion, and that to accept Defendant's interpretation would render Plaintiff's losses caused by spoilage completely eliminated.

III.

The parties dispute the definition of "Total Insurable Values," which is undefined in the contract. Plaintiff asserts their reasonable expectation was TIV included the value of the property "involved in the loss or damage." *Lexington Policy*, § I(G)(3). Plaintiff identifies as an ambiguity the fact that "Total Insurable

Values" is capitalized in Section I(G)(3), but not defined in the Policy, nor referenced in any other section.

Plaintiff asserts that Lexington seeks to apply a $22 million Named Storm deductible while the Wind and Hail sublimit (the maximum insurable amount that Plaintiff could recover for wind and hail losses) is $150 million. Plaintiff contends that under no reasonable interpretation of the Policy would the applicable wind and hail deductible for $150 million in insurable losses be more than $ 3 million, or 2% of $150 million.

Plaintiff asserts that in its correspondence with Lexington regarding coverage, Lexington did not provide an adequate explanation of their calculations and Lexington's incorporation of the "actual value" of the entire building (not just the value of damage) substantially inflates the deductible.

Plaintiff argues "TIV" is vague, ambiguous, subject to two reasonable meanings, and "is so confusing that the average policyholder cannot [discern] the boundaries of

coverage." *S.T. Hudson Engineers v. PA. Natl. Mut. Cas. Co.*, 388 *N.J. Super.* 592, 603 (App. Div. 2006), *cert. denied,* 189 *N.J.* 647 (2007); *Weedo v. Stone-E-Brick, Inc.*, 81 *N.J.* 233, 247 (1979). Plaintiff asserts that if Lexington and Plaintiff's definitions of TIV are equally plausible, the interpretation that favors the insured must prevail. *President v. Jenkins,* 180 *N.J.* 550, 563 (2004) ("When an insurance policy's language fairly supports two meanings, one that favors the insurer, and the other that favors the insured, the policy should be construed to sustain coverage."). Plaintiff considers Lexington's contention that the wind and hail deductible is calculated using all "actual values" at a location as eviscerating coverage. Plaintiff contends that Lexington's interpretation overlooks whether the property was "involved in the loss or damage".

Plaintiff references a recent decision, where the policy language differed yet the substantive issues were the same. There the policy had a $2.5 million sublimit for flood loss that applied a deductible for certain

losses at "2% of the total insurable values at risk per location subject to a minimum of $250,000." *Castle Oil Corp. v. ACE Am. Ins. Co.*, No. 55812/13, 2014 WL 459904 (N.Y. Sup. Ct. Jan. 2, 2014)(*Pl.'s Cert.*, Ex. 16.) In *Castle Oil*, Plaintiff policyholder sustained $2.28 million in damages resulting from Sandy. The insurer attempted to apply a 2% deductible on the value of all the property at the insured's facility, which according to an endorsement was $124 million. Plaintiff argued that the maximum deductible was 2% of the $2.5 million sublimit as it was the maximum loss for which the insurer was "at risk" for flood damage. The court agreed with Plaintiffs, holding that the deductible should be applied to no more than the value covered by the policy, and observed that "values at risk" was undefined in the Policy. Plaintiff notes that the Court in *Castle Oil* also held that the insurer's proposed $2.4 million deductible (as against a $2.2 million claim) would render the flood coverage illusory. Plaintiff asserts that while the policy language at bar differs, a similar rationale for

a limitation on the scope of the deductible should apply. Plaintiff contends that Lexington's theory renders it possible for an insurer to include uncovered and undamaged property in the valuation of the deductible, thereby artificially inflating Plaintiff's deductible.

Defendant argues that TIV refers to the "total" of the combined "values" for the insured's various interests that are "insurable" under the Policy. (*Pl.'s Cert.*, Ex. 3). Defendant contends TIV includes values for physical buildings, any improvements thereto, all contents and time-element values such as values for business income. Defendant cites the IRMI Online Glossary of Insurance Risk Management Terms for the language and urges that Plaintiff had no issue determining its TIVs, when preparing a Statement of Values, during the underwriting and policy procurement process. The Statement of Values identified Plaintiff's insurable coverage Values at each location. (*Def.'s Cert.*, Ex. 20.) Defendant contends that the Named Storm Deductible itself uses the word "location", which is defined in the Policy to include

"the location as specified in the Statement of Values." (*Pl.'s Cert.*, Ex. 3); (*Def.'s Cert.* Ex. 19.)

Next, Defendant asserts that Plaintiff's argument that 2% should be taken from a fixed amount of $150 million, referred to by Plaintiff as the "Wind and Hail sublimit" must fail because there is no "Wind and Hail sublimit" in the Policy. Defendant maintains that even if such a sublimit existed, Plaintiff's proposal of applying 2% would always result in a deductible of exactly $3 million. Defendant asserts that if a deductible of $3 million were intended to apply to each Named Storm occurrence, the Policy would have so stated.

Defendant argues that courts should not apply the doctrine of *contra proferentum* where a sophisticated commercial insured has equal bargaining power, demonstrated by the insured's participation in drafting the policy or that the policy was jointly negotiated. *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 195 *N.J.* 231 (2008); *Pacifico,* 190 *N.J.* at 268 ("*[C]ontra proferentum* is only available in situations where the

parties have unequal bargaining power. If both parties are equally worldly-wise and sophisticated, *contra proferentum* is inappropriate").

Defendant asserts that here, Plaintiff is part of a large, grocery store cooperative with member stores throughout NY and NJ, and hence constitute sophisticated commercial entities that used insurance-procurement professionals during the procurement and underwriting of the Policy at issue. Defendant argues that plaintiff is not an unsophisticated policyholder.

Conclusions

"[W]hen deciding a motion for summary judgment under Rule 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a

rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Amer.*, 142 *N.J.* 520, 523 (1995). Genuine issues of material fact preclude summary judgment. *Id.* at 530. Disputed factual issues of an "insubstantial nature" do not. *Id.* (citing *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 75 (1954)).

Application of the Named Storm deductible for damage caused by Sandy is consistent with the clear and unambiguous language of the Policy. The Lexington Policy provides that the Named Storm deductible applies when a storm has been declared by the National Weather Service to be a Hurricane, Tropical Cyclone, Tropical Storm, or Tropical Depression. It is undisputed that prior to 7:00 p.m. on October 29, 2012, Sandy was a hurricane. Although Wakefern asserts that when Sandy made landfall at approximately 8:00 p.m., it was officially categorized as a "post tropical cyclone." It is undisputed that damage at some Wakefern locations

occurred prior to 7:00 p.m. The Court finds that the Pre-7:00 p.m. damage while Sandy was still a hurricane created a substantial nexus between the storm and Wakefern's total losses. In an email dated November 11, 2012 Craig Hoffman, a Wakefern Risk Manager, wrote to BWD, attaching a preliminary summary of product losses ("Product Loss Summary"), which included multiple stores' reports of power loss well before 7:00 p.m. According to the Product Loss Summary, approximately 25 of 90 locations reported power outages prior to 7:00 p.m., while Sandy was a hurricane. Store Number 22 (New City), for example reported outages at 4:30 p.m.; Store Number 121 (Rochelle Park) reported outages at 6:15 p.m. The Court finds that the phrase "arising out of" is frequently used in insurance policies and should be treated liberally.[1]

[1] In *Flomerfelt v. Cardiello*, the plaintiff filed suit over the defendant's failure to summons help when she overdosed during a party at the defendant's home, and was seeking recovery under the defendant's homeowners' insurance policy. *Flomerfelt*, 202 *N.J.* at 454. The policy at issue excluded injuries that "arose out of" the "use, sale . . . or possession of a controlled dangerous substance." Id. The court determined that injuries "arising out of" the possession of a controlled dangerous substance should be liberally construed and a showing of proximate causation was not required. Id. The *Flomerfelt* court also articulated that a "substantial nexus" between an injury and loss must be shown, especially in situations where there may be concurrent or subsequent causes of loss. *Id.* at 455. The court specifically held that where the "loss is part of a chain of events" or part of "interrelated or concurrent causes" that, in the context of *Flomerfelt*, "began with the use of drugs at the party," a "substantial nexus" cause may be found.

The Court also finds Executive Order No. 107 inapplicable to the instant commercial matter.

Therefore, application of the Named Storm deductible is consistent with the language of the policy and Plaintiff's motion for partial summary judgment on that issue is hereby **DENIED.** Defendant's cross motion for partial summary judgment declaring that the Named Storm deductible applies to all of Plaintiffs' locations is **GRANTED.**

Next, the Court considers whether or not spoilage is a more specific separate deductible, which should apply. Here, both spoilage and Named Storm losses are covered as deductibles. The issue before the Court is the appropriate deductible to be applied to the claim. Invoking Appleman's Rule to support a finding that the Spoilage deductible applies to the losses separately, would be inconsistent with the plain language of the Policy. The Named Storm provision provides coverage for "loss or damage arising out of a Named Storm regardless of the number of Coverage's, Locations, or Perils

involved." Spoilage is referenced under the "Additional Coverages" section of the Policy, which provides that "additional coverages are subject to the terms and conditions of this policy, including the deductibles and sublimits of liability corresponding to each such additional coverage." The Policy language is clear regarding additional coverage for Spoilage being subject to the terms of the policy, including the Named Storm provision, which applies "regardless of the number of Coverage's." The Court, therefore, does not isolate the Spoilage loss from the rest of the claim.

Therefore, application of the Spoilage deductible over that of the Named Storm deductible is inconsistent with the language of the policy and Plaintiff's motion for partial summary judgment on that point is **DENIED**.

The Court finds that the Named Storm deductible is unambiguous as to "TIV", and that the phrasing is not so confusing that Wakefern was rendered unable to discern the boundaries of coverage. Absent New Jersey

cases defining "TIV," this Court considered foreign jurisdictions' and their interpretations informative.

In *Beverly Hills Condominium 1-12 Inc. v. Aspen Speciality Ins. Co.*, the policy at issue was an "all risk" policy, with specific coverage for hurricanes. *Beverly Hills Condominium 1-12 Inc. v. Aspen Speciality Ins. Co.*, 2007 WL 1183939. The "Windstorm or Hail" deductible was calculated as "5% of TIV per location." The insurer claimed that the windstorm deductible should be calculated as 5% of the total value of all the structures insured under the policy; whereas the insured argued TIV must be calculated as 5% of the policy's total limit of insurance per occurrence ($5,000,000). The court, considering the policy as a whole, held "[a]n insurance policy, though it may be complex, is not ambiguous merely because it requires an analysis to interpret it," and held that under the policy at issue, it would not be reasonable to interpret TIV to mean "insurance limit per occurrence." Id. at *3-4. ("If the policy deductible was meant to be

a percentage of the occurrence limit, the policy certainly would have used those words rather than the terms 'total insurable value.'"). Similarly, in the Policy at bar, TIV is not expressly defined, however, TIV is a commonly used insurance term and Wakefern retained an insurance broker to specifically aid in policy interpretation. Wakefern asserts, as did the plaintiff in *Beverly Hills*, that because TIV is undefined in the policy, an alternative interpretation is reasonable. The Court is not persuaded by the argument.

In *Terra-Adi Intl. Dadeland LLC v. Zurich American Ins. Co.*, the court had to interpret the phrase "total insured values at risk" as contained in a hurricane deductible. *Terra-Adi Intl. Dadeland LLC v. Zurich American Ins. Co.* 2007 WL 675971 (the provision specifically stated the deductible was calculated by "5% of the total insured values at risk at the time and place of loss, as respects the peril of windstorm."). Unlike *Beverly Hills*, the policy in *Terra-Adi* contained

modifying language following "total insured values" that rendered the provision susceptible to multiple interpretations. The *Terra-Adi* court therefore found the insured's interpretation reasonable and "consistent with the view of the purpose and calculation of insurance deductibles held by Florida courts." Id. at *3.

The Named Storm deductible at issue in the instant matter does not contain any modifying language that would support a finding of ambiguity. As plaintiff accurately contends, the Policy language includes the phrase "involved in the loss" which further defines the applicable deductible. While, Plaintiff asserts that this phrase refers to a sublimit, or at least is ambiguous, this Court has no trouble interpreting the phrase. The Named Storm deductible should be 2% of the aggregate Statement of Values at the stores for which Plaintiff submitted a claim. Those stores constitute the properties "involved in the loss." The Named Storm deductible clearly states "2% of Total Insurable Values

at the time of loss at each location involved in the loss or damage arising out a Named Storm regardless of the number of Coverages, Locations, or Perils involved." The provision clearly means that if a location is "involved in the loss or damage," the deductible is calculated by taking 2% of the stated value of the entire location.

In *Castle Oil Corp. v. Ace American Ins. Co.*, the Named Storm provision at issue provided that deductibles were calculated by taking "2% of the total insurable values at risk per location subject to a minimum deductible of $250,000." *Castle Oil Corp. v. Ace American Ins. Co.* 2014 WL 459904 (N.Y.Sup. Jan. 2, 2014). There, a New York court determined that the provision was ambiguous, in part, because the policy had not "stated that the sum [of the entire location] would be used as the 'total insurable values at risk per location' . . . for the purpose of calculating the applicable deductibles." Id. at *4. The *Castle Oil* court also determined that the "values at risk"

language referred to the "sublimit amount, and the total value of the property insured under the policy," and held that the deductibles would be calculated with respect to the sublimit amount because the insurer was only at risk of paying up to that amount. *Id.*

While this Court considered the *Castle Oil* opinion, the circumstances of these cases are distinguishable. The Named Storm deductible in the instant Policy does not reference any "values at risk" which were referenced in *Castle Oil* policy. The "arising out of" language at bar is inclusive while the "values at risk" language of *Castle Oil* is limiting. The Named Storm deductible therefore should be calculated by taking 2% of the value of an entire location which experienced a loss arising out of a Named Storm.

TIV is a commonly-used phrase in the insurance industry referring to the sum of the full value of the insured's covered property, business income values, and other covered property interests. *IRMI Online, Glossary of Insurance and Risk Management Terms (2014)*. TIV

refers to everything insured under a policy, including but not limited to the structure's value, contents, materials, business income, and equipment, and is calculated using a policy's Statement of Values.[2]

This Court finds that TIV is a commonly understood term in the insurance industry and was mutually understood by the parties in the instant matter. Furthermore, the term may be modified, defined alternatively, or altered, by mutually agreeable policy language.

Based on the aforementioned, it is unnecessary for the court to reach the doctrine of *contra proferentum*. Plaintiff's motion for partial summary judgment is **DENIED**. Defendant's cross motion for partial summary judgment that the Named Storm deductible is two percent of the total insurable value at each location is hereby **GRANTED**.

Dated: October 29, 2014

Travis L. Francis, A.J.S.C.

[2] See Port Auth. v. Affiliated FM Ins. Co., 2000 U.S. Dist. Lexis 20724 (D.N.J. June 5, 2000) defining "insurable values" as those submitted by the insured during the placement process.

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FILED

OCT 29 2014

JUDGE TRAVIS L. FRANCIS

WAKEFERN FOOD CORP.; AJS SUPERMARKETS, LLC; BUONADONNA SHOPRITE, LLC; BROWN'S BC, LLC; BROWN'S FH, LLC; LITTLE FALLS SHOPRITE SUPERMARKETS, INC.; SHOPRITE OF HUNTERDON COUNTY, INC.; COWHEY FAMILY MARKETS; BROOKDALE SHOPRITE, INC.; KRE, INC.; EICKHOFF SUPERMARKETS, INC.; KGJ ASSOCIATES, LLC; HFE, INC.; FIVE STAR SUPERMARKETS OF CLINTON, INC.; FIVE STAR SUPERMARKETS OF NEW LONDON, INC.; WEST HAVEN MARKETS, INC.; HAMDEN MARKETS, INC.; SUNRISE SHOPRITE, INC.; SUNRISE SHOPRITE OF PARSIPPANY, LLC; SUNRISE SHOPRITE LIQUORS, INC.; GLASS GARDENS, INC.; SHOPRITE OF ENGLEWOOD ASSOCIATES, INC.; ROCKAWAY SHOPRITE ASSOCIATES, INC.; NYC SHOPRITE ASSOCIATES, INC.; GRADE A MARKET, CT LIMITED PARTNERSHIP; GRADE A MARKET - DERBY - LLC; GRADE A SHOPRITE OF FAIRFIELD LLC; INSERRA SUPERMARKETS, INC.; LML SUPERMARKETS, INC.; JANSON SUPERMARKETS, LLC; MLTK, LLC; McMENAMIN FAMILY SHOPRITE INC.; KTM SUPERMARKETS, INC.; KTM II SUPERMARKETS, INC.; RONETCO SUPERMARKETS, INC.; BYRAM BEVERAGE; HACKETTSTOWN BEVERAGE, INC.; SAKER SHOPRITES, INC.; VILLAGE SUPER MARKET, INC.; CHEWS LANDING SHOPRITE, INC.; KEARNY SHOPRITE, INC.; SHOPRITE OF LINCOLN PARK, INC.; SHOP-RITE SUPERMARKETS, INC.; PRRC, INC.; and WAVERLY MARKETS OF EAST HARTFORD, LLC,

Plaintiffs,

v.

LEXINGTON INSURANCE COMPANY,

Defendant.

SUPERIOR COURT OF NEW JERSEY
MIDDLESEX COUNTY
LAW DIVISION
DOCKET NO. MID-L-6483-13

Civil Action

DENYING

ORDER ~~GRANTING~~ PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO THE APPLICABILITY AND INTERPRETATION OF THE "NAMED STORM" DEDUCTIBLE

THIS MATTER having been opened to the Court by Plaintiffs, by and through their counsel, McCarter & English, LLP, for an Order pursuant to *Rule* 4:46-2, for partial summary judgment as to the application and the interpretation of the "Named Storm" deductible; and the Court having considered the moving papers, any opposition and reply thereto; and the argument of counsel; and for the reasons placed on the record; and good cause shown;

IT IS on this 29th day of ~~April~~ October 2014:

ORDERED that Plaintiffs' Motion for Partial Summary is ~~GRANTED~~ DENIED; and it is further

ORDERED that the October 29, 2012 storm that caused Plaintiffs' losses at issue in this matter does not qualify as a "Named Storm" as that term is defined in the Wind & Hail deductible of the insurance policy at issue in this matter; and it is further

ORDERED that a copy of this Order shall be served on all counsel of record within seven (7) days of receipt.

Travis L. Francis

Honorable Travis L. Francis, J.S.C.

✓ Opposed

___ Unopposed

Conformed copy

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FILED
OCT 29 2014
JUDGE TRAVIS L. FRANCIS

WAKEFERN FOOD CORP., et al. Plaintiffs, v. LEXINGTON INSURANCE COMPANY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY Docket No. MID-L-6483-13 Civil Action **ORDER**

THIS MATTER having been opened to the Court by Plaintiffs, by and through their counsel, McCarter & English, LLP, for an Order pursuant to *Rule* 4:46-2 for partial summary judgment regarding the Named Storm deductible, with opposition and cross motion pursuant to *Rule* 4:46-2 for partial summary judgment by Defendant Lexington Insurance Company, by and through its counsel, Mound Cotton Wollan & Greengrass; and the Court, having considered the moving and cross-motion papers, and any reply thereto; and the argument of counsel; and for the reasons placed on the record; and good cause shown;

IT IS on this 29th day of Oct. 2014:

ORDERED that Plaintiffs' Motion for Partial Summary Judgment is DENIED; and it is further

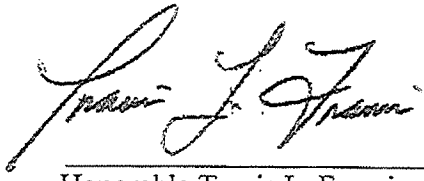
ORDERED that all of Plaintiffs' locations at issue sustained loss or damage "arising out of" a Named Storm; and it is further

ORDERED that the Named Storm deductible applies to all of Plaintiffs' locations at issue; and it is further

ORDERED that the Named Storm deductible is two percent of the total insurable values at each location involved in the loss; and it is further

ORDERED that Lexington's Cross Motion for Partial Summary Judgment is GRANTED; and it is further

ORDERED that a copy of this Order shall be served on all counsel of record within seven days of receipt.



Honorable Travis L. Francis, J.S.C.

✓ Opposed

___ Unopposed