

Think it....But Don't Text You're Gonna Sink It!



By: Neil Bayer

Campbell Johnston Clark

261 F.Supp.3d 1257
United States District Court, S.D. Florida.
KOL B'SEDER, INC., a Florida Corporation, Plaintiff,

v.

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO CERTIFICATE
NO.154766 UNDER CONTRACT NO. B0621MASRSWV15BND, and Glass-Tech Corporation, a
Florida Corporation, Defendants.

Case No. 16-22237-Civ-COOKE/TORRES

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Signed 5/30/2017

Kol B'Seder bought the M/Y *Sababa*, a now eighteen-year-old motor yacht, in 2002. (ECF No. 76 ¶ 2; ECF No. 53-1 at 15, 17).

It did so planning eventually to offer charters to and from the Bahamas. (ECF No. 53-1 at 43-45).

In the years following the purchase, Kol B'Seder's principal owner, Noreen Sablotsky, docked the yacht at her waterfront home (*Id.* at 62-63) and operated it in and around Biscayne Bay, the Miami River and, occasionally, the Bahamas. (*Id.* at 16).

During the period relevant to this lawsuit, Kol B'Seder insured the vessel through Underwriters. (ECF No. 79-1).

Prior to the *Sababa*'s partial submersion, Sablotsky did not know how often a vessel should undergo routine maintenance or be hauled out of the water for repairs. (*Id.* at 170-74), but she claimed that someone checked the *Sababa*'s engines and bilge systems weekly (*Id.* at 19, 116, 119), and that a scuba diver cleaned the yacht's hull monthly. (*Id.* at 33).

Despite those efforts, the passage of time was not kind to the *Sababa*. In 2008, she had engine trouble that took two years to fix. (*Id.* at 39). Also in 2008, the vessel required work on its rudder. (*Id.* at 132–34; ECF No. 68–2 at 16–18). In 2012, the vessel again had engine problems that required extensive repair work. (ECF No. 53–1 at 41, 135–40). It had repairs to its hull in April 2013 (*Id.* at 34–43; 135–40),⁴ and in August 2015, Sablotsky’s diver told his boss the yacht needed a haul-out. (ECF No. 68–4 at 17–18, 38).

The vessel sunk the evening it was delivered to the co-defendant’s yard and Kol B’Seder thru it’s owner Noreen Sablotsky filed an insurance claim with Underwriters that day.

Agnes Henderson of York Risk Services Group (“York”), the Underwriters’ Third Party Administrator, handled the claim. Henderson called Sablotsky to find out if there had been an incident leading to the *Sababa*’s partial submersion, and Sablotsky told her that she did not remember grounding the vessel. Sablotsky later said the same thing to York’s surveyor, Stuart Hutchinson, who surveyed the vessel the following day on the hard in the co-defendant’s boat yard.

Based in part on Hutchinson’s survey report, Underwriters denied Kol B’Seder’s claim.

Henderson testified that “we usually look for coverage on claims, but on this loss, there were three to four areas that had specific exclusions on, and I couldn’t see offering coverage on it. So my recommendation was to deny the claim.” Paul Marks, another adjuster who worked on the claim, likewise testified, “we are looking for positive coverage offered by the policy for direct accidental physical loss of damage during the period of insurance. So we reviewed the survey report for evidence of that accidental physical loss or damage first, and when we cannot find any, as we couldn’t in this particular case, we then begin to review the exclusions which state that a loss caused directly or indirectly by one of these exclusions is not covered.” (ECF No. 54–1 at 47).

□



















On May 12, 2016, Henderson informed Kol B'Seder of Underwriters' decision. She cited, and Underwriters relied on, four Policy exclusions to justify the determination:

We do not provide coverage under Section 1 (Hull) for losses or damages arising directly or indirectly from:

....

C. Wear and tear, gradual deterioration, osmosis, wet or dry rot, corrosion. Weathering, marring, scratching, denting, vermin, pets or marine life, or electrolytics or galvanic action;

D. Manufacturer's defects or defects in design;

....

K. Any claims caused by or arising out of the unseaworthiness or lack of repair of Your Boat caused by the lack of reasonable care and due diligence in the safeguard or maintenance of Your Boat by You or any other party in control of Your Boat with Your Authority;

....

T. Negligence or breach of contract in respect of any repair or alteration work carried out for Your account or in respect of the maintenance of Your Boat.

POINTS OF LAW RELIED ON BY THE TRIAL COURT

The interpretation of insurance policies, like the interpretation of all contracts, is generally a question of law. [Lawyers Title Ins. Corp. v. JDC \(Am.\) Corp., 52 F.3d 1575, 1580 \(11th Cir. 1995\).](#)

When interpreting an insurance policy, Florida courts “start with the plain language of the policy, as bargained for by the parties.” [State Farm Fire & Cas. Co. v. Steinberg, 393 F.3d 1226, 1230 \(11th Cir. 2004\)](#) (quoting [Auto-Owners Ins. Co. v. Anderson, 756 So.2d 29, 34 \(Fla. 2000\)](#)).

The “Florida Supreme Court has made clear that the language of the policy is the most important factor. Under Florida law, insurance contracts are construed according to their plain meaning. [James River Ins. Co. v. Ground Down Eng'g, Inc., 540 F.3d 1270, 1274–75 \(11th Cir. 2008\)](#) (quoting [Taurus Holdings, Inc. v. United States Fid. and Guar. Co., 913 So.2d 528, 537 \(Fla. 2005\)](#)).

Thus, a court interprets policy language according to its “ ‘everyday meaning’ as it is ‘understandable to the layperson.’ ” [Ohio Cas. Ins. Co. v. Cont'l Cas. Co.](#), 279 F.Supp.2d 1281, 1283 (S.D. Fla. 2003) (quoting [Hrynkiw v. Allstate Floridian Ins. Co.](#), 844 So.2d 739, 741 (Fla. Ct. App. 2003)).

If “the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as written.” [Travelers Indem. Co. v. PCR Inc.](#), 889 So.2d 779, 785 (Fla. 2004);

The court must read policy as a whole and give every provision its full meaning and operative effect). This maxim applies equally to exclusions—if an exclusionary provision is unambiguous, a court must apply the exclusion as written. [Steinberg](#), 393 F.3d at 1230 [Steinberg](#), 393 F.3d at 1230

Here, the four policy exclusions on which Underwriters relies plainly state that the Policy provided no coverage for the kind of “losses or damages” Kol B’Seder suffered when the *Sababa* partially submerge

Exclusion “C” excludes from coverage “[w]ear and tear, gradual deterioration, osmosis, wet or dry rot, corrosion. Weathering, marring, scratching, denting, vermin, pets or marine life, or electrolytics or galvanic action.” (*Id.* at 4). **The evidence shows the vessel’s problems arose, at least in part, from: (1) hydraulic forces the external rudder and rudder log underwent “over time” ; (2) “water [that] had been ingressing the bilges in the engine space for some time thru the starboard rudder log and penetrations for the trim tab hydraulic plumbing”; (3) water weeping into the underlying laminates “over time”; and (4) fractured laminates that “certainly did not happen suddenly or whilst the vessel was at [Glass–Tech].”**

□

Exclusion “D” excludes from coverage “[m]anufacturer’s defects or defects in design.” **The evidence shows that vessel’s problems arose, at least in part, from “the design and installation of external rudder logs.”**

□

Exclusion “K” excludes from coverage “[a]ny claims caused by or arising out of the unseaworthiness or lack of repair of Your Boat caused by the lack of reasonable care and due diligence in the safeguard or maintenance of Your Boat by You or any other party in control of Your Boat with Your Authority.” **The evidence shows the vessel’s problems arose, at least in part, from: (1) Kol B’Seder’s failure to attend to “open and obvious” signs that the *Sababa* was in deteriorating condition; (2) Kol B’Seder’s failure to have the *Sababa* hauled out and repaired on a timely basis; and (3) Sablotsky’s’s failure to ensure that the vessel was plugged into shore power when she left it at the Glass–Tech boat yard.**

□

Exclusion “T” excludes from coverage “[n]egligence or breach of contract in respect of any repair or alteration work carried out for Your account or in respect of the maintenance of Your Boat.” (ECF No. 5–1 at 4). **The evidence shows the vessel’s problems arose, at least in part, from: (1) Kol B’Seder’s failure to have the *Sababa* hauled out and repaired on a timely basis; and (2) failure of repairs performed in 2008.**

NOTWITHSTANDING . . .

NOREEN SABLITSKY TESTIFIED IN DEPOSITION

In her view, the vessel was not seaworthy to travel in the open seas: “And the boat, if you look at the—was seaworthy to the point of getting—I got insurance and it was safe in that it wasn’t going to sink. But it was—it wasn’t seaworthy to go anywhere, to the Bahamas. So I had a long list of things to do.” □

AT&T LTE 12:20 PM 48%

Messages (4) Noreen

Details

Thu, May 12, 11:23 AM

Insurance rejected the claim

Now it's time to get attorney and surveyor involved

Got it. So pissed

That boat is going to be there for a long time

Did you get any estimates?

AT&T LTE 12:20 PM 48%

Messages (4) Noreen

Details

I should fix the rudder... Take it out and run it aground

Sink it

Yeah but right now they would deny coverage

I need to fix it the bare minimum. Let them come inspect and then sink it in 3 months

Have you gotten any prices?

Discussion/Questions