

**South Nassau Hellenic Community, Inc. v Church
Mut. Ins. Co.**

2012 NY Slip Op 30486(U)

February 15, 2012

Sup Ct, Nassau County

Docket Number: 015256-09

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----X
SOUTH NASSAU HELLENIC COMMUNITY, INC.
d/b/a SAINT DEMETRIOS GREEK ORTHODOX
CHURCH OF MERRICK,

TRIAL PART: 10

NASSAU COUNTY

Plaintiff,

INDEX NO: 015256-09

-against-

MOTION SEQ NO.:2

CHURCH MUTUAL INSURANCE COMPANY,

Defendant.

SUBMIT DATE:12/1/11

-----X
The following papers having been read on this motion:

Notice of Motion.....1
Opposition.....2
Reply.....3

This motion by the defendant Church Mutual Insurance Company (“Church Mutual”) for an order pursuant to CPLR§ 3212 granting it summary judgment declaring that the policies it issued to the plaintiff South Nassau Hellenic Community, Inc. d/b/a Saint Demetrois Greek Orthodox Church of Merrick (“the Church”) do not afford the Church coverage for property damage claims dated 2003, 2007 and 2008 and dismissing complaint is determined as provided herein.

In this action, the Church seeks to secure insurance coverage from Church Mutual for three events: water damage to its property sustained on or about June 8, 2003; theft loss of gutters with resulting water damage beginning on July 1, 2007; water and mold damage to its property sustained in May/June 2008. Church Mutual seeks summary judgment dismissing the complaint on the grounds that the 2003 claim is time-barred; the Church’s notices were all untimely; and, none of the claims are covered under the policies.

The facts pertinent to the determination of this motion are as follows:

Thomas W. Pragias, legal adviser as well as a former Treasurer, Vice-President and President of the Church, testified at his examination-before-trial that the Church was founded in 1958. It was originally located in Freeport and was built at its present location in 1984. Pragias testified that

leaking problems in the roof's dome where it connects to the four parts of the cross began "probably right after" the Church was built. He testified that "[e]very now or then if there was a driving rain you would get some kind of moisture" as a result of which puddles would form on the alter. He testified that when the Church was preparing to add iconography which was very costly, they needed to ensure that they had "a complete airtight situation." To that end, they hired M.J. Macaluso, an engineer with an expertise in church construction. He completed a "Moisture Intrusion Analysis" report. In 1998, he advised that the way the roof meets the building had to be changed. More specifically, he recommended that all dome flashings be replaced and that the entire roof, including the membrane system and sub-roof patching, be replaced. Pragias testified that almost everything Macaluso recommended was done. A new roof was put on the dome and it was copperized. He also testified that coatings, flashing and sealants were installed or replaced; the bell tower was drained and repaired; and, preventative maintenance was done. In 2000, Macaluso opined that the Church's original design was faulty. He recommended a change in the design and renovation of the dome. The design however was not changed.

At his examination-before-trial, Pragias testified that when he arrived at the Church on June 8, 2003, he noticed that the dome "looked like somebody took a hammer to it It looked like a surface of the dome on the inside was all damaged [T]here were some fragments of plaster on the alter It was rippled. It looked like water seepage." He opined that the damage "was caused by wind pushing the cross [on top of the dome] over and letting water in." Parishioners helped with the repair and he estimated that the Church spent between \$10,000 and \$15,000 repairing the damage. He testified that Fillas, the Church's president in 2003, reported the damage/loss to Church Mutual and that the claim was denied on September 12, 2003. In denying the claim, Church Mutual advised that upon examination of the property, George Rolla of MSW Adjustment Group found that it appeared that water was entering in the immediate vicinity where the cross is mounted to the dome's highest point, however, he did not find any wind damage to the dome. This finding, however, is inconsistent with Rolla's own finding that his "inspection revealed that due to heavy winds and rains, water infiltrated the roof in the immediate vicinity with the dome's peak." Furthermore, Rolla explained in his report:

Due to the Church's construction, we were only able to view the dome from

the closest rooftop, but did not observe any damage due to windstorm, hail or similar peril (emphasis added).

Rolla's report to Church Mutual estimated the cost of the scaffolding rental to make the repairs at \$10,600 and the cost for repair and painting of the interior at \$12,337.15 Church Mutual advised the Church that under the policy, damage resulting from faulty, inadequate or defective design, specifications, workmanship, repair, construction, renovation, remodeling, grading or compaction is excluded and that the policy provides that the exterior of the building must first sustain damage due to a covered loss before the interior damages can be considered.

Pragias testified at his examination-before-trial that on July 2, 2007, copper gutters were discovered missing at the Church. A police report was filed. He testified that as a result of the missing gutters, rain water penetrated a Church wall, there was water seepage in the pews and mold was found in one small area shortly thereafter. As for notice, he testified that he "believed" that the Church office contacted Church Mutual a week later on July 8th and that only a claim for the gutters and water damage to the walls was made. He testified that it was denied. Aluminum gutters donated by a parishioner were used to replace the stolen copper gutters and using bleach he cleaned the mold.

Pragias testified at his examination-before-trial that in late May or early June a wind "knocked over one of the trees on the side of the Church [and] knocked down and uprooted bushes." He testified that the flat roof was damaged as a result of which areas of the Church were flooded, some areas "like a lake." Clean up efforts were undertaken by the congregation including pumping the water, removing the carpet and the ceiling and barricading certain areas. Pragias testified that a few weeks after the flooding, mold developed on account of the dry, hot weather and so the Church brought in the environmental company Gallinger Environmental Management Corp., to assess the situation. Based on its inspection of June 9, 2008, in its report dated June 27, 2008, Gallinger Environmental concluded that "mold growth in the building is the result of a roof leak that occurred in Spring 2008." It concluded that the mold was a health hazard and so Pragias hired Duraclean, a mold remediation company, in mid or late June to rectify the situation. Pragias testified the he asked Rob Sidone of Duraclean to contact Church Mutual. Pragias testified that Duraclean charged \$350,000 for its services, a portion of which had been paid. He testified that the Church had Michael Hughes of All-Pro Siding and Windows repair the flat roof and that Hughes told him that the flat

roof had been lifted up by the wind which permitted the water to enter the Church. Pragias testified that Hughes actually showed him where the roof tiles had been torn up and that All-Pro charged the Church approximately \$16,000 to repair the roof. Pragias testified that having believed that Duraclean was notifying Church Mutual of the claim, he himself only personally contacted Church Mutual in late August when no one from Church Mutual had come. Church Mutual had claimed to have no record of having been notified of the claim.

Similarly, Pragias presently attests that:

“In May of 2008, several windstorms occurred during mid to late May. The winds were almost like a mini-tornado in the limited area of the Church, and even caused a tree to topple over. This was capped off in late May with a downpour of heavy rain and wind. This storm, or series of storms, caused severe water penetration into the Church’s choir loft (directly below the “flat” roof in front of the Church).

One morning when I arrived at the Church, I saw that the entire carpeting of the choir loft (that is approximately thirty by forty feet) was soaking wet and water was traveling down the southwest stairway from the choir loft into the basement.

I personally examined the “flat” roof at the westerly side of the Church. I found that sections of the roof were lifted up, with a section of the roof having been actually blown off.”

Pragias admitted that out of necessity, Church counsel members undertook certain repair work immediately including pumping out the water and removing the carpet and ceiling.

Nikiforos Fakinos also attests to severe wind and rainstorms in May and early June 2008 over several days which caused exterior damage to the Church and caused the choir/balcony to be flooded.

Robert Sindone, President of Duraclean Disaster Cleanup, attests that upon examining the exterior of the Church when he first visited it on June 6, 2008 to inspect the damage, he “immediately noticed that there was physical damage to portions of the ‘flat’ roof which is in the

front of the building . . . and which is over the balcony/choir section.” He attests that “[p]ortions of that flat roof had been lifted up due to high winds, allowing rain water to penetrate the building [and that] so much water entered the building through the damaged portion of the flat roof that water traveled from the choir section into a stairwell . . . down to the basement level.” He opines that this gave rise to the mold problem. Mr. Sindone opines that the policy definitely provides coverage for the services provided by Duraclean in this matter because wind caused damage to the exterior of the Church (i.e., the flat portion of the roof) and allowed water to penetrate.

Michael Hughes, President of Michael Hughes, Inc., d/b/a All-Pro Siding and Windows, similarly attests that he inspected the Church roof at Mr. Sindone’s behest on June 10, 2008 and he “observed wind damage to a portion of the Church’s roof, including: lifted sections; flashing pulled away from walls; and dislodged tiles.” He attests that:

“[o]n [his] first site inspection, [he] went up on the flat portion of the roof of the Church with Robert Sindone. [He] immediately noticed wind damage to that portion of the roof. That portion of the Church’s roof was covered by bituminous rolled roofing membrane. Several portions of the roof structure had been ‘lifted’ by strong winds, and the membrane seems torn, allowing wind-driven rain to penetrate into the building’s structure.”

It is his opinion as a roofing contractor and expert “that the water infiltration into the Church was caused by wind (storm) damage to the ‘flat’ portion of the Church’s roof, rather than the result of normal ‘wear and tear,’ ‘deterioration,’ ‘faulty workmanship’ and/or ‘neglect.’” Photographs he took of the damaged flat roof accompany his affidavit.

Sean Sarver, Church Mutual’s Service Property Claims Adjuster assigned to this claim, testified at his examination-before-trial that Church Mutual received notice of the Church’s 2008 claim on August 29, 2008. It hired MSW Adjustment Group to investigate it, in particular the cause of the water infiltration, and MSW Adjustment Group retained Affiliated Engineering Laboratories, Inc. to investigate the source and cause of the water infiltration and mold development. Stan Pietra of Affiliated Engineering Laboratories, Inc. checked the weather records and concluded that there had been no significant wind events during the weeks surrounding the water entering the Church. Examining weather records from Farmingdale, New York, Pietra found that the maximum wind

gusts in the area occurred on May 19, 2008 and were only 32.2 mph. Pietra also inspected the Church. He found that there was no significant storm-related damage to the roof and that the interior deterioration in the form of rust and disintegrated decking, exposed spalled concrete and extensive cracking and peeling of paint services had been caused by long term water infiltration. As for the roof repairs, Pietra noted that although three layers had been removed by All-Pro Siding, the local building code and industry custom dictate that roof coverings be removed when the existing roof has two or more applications of any type of roof coverage. Following his inspection of the property on September 25, 2008, on behalf of Church Mutual, Stan Pitera concluded in his report dated October 28, 2008 that “[t]here was no evidence of storm related damage to the roofing surface” and that the damage to the property was solely the result of “long term water infiltration.”

By letter dated November 12, 2008, Sean Sarver denied the claim on several grounds. The claim was denied based upon late notice and the Church’s failure to afford Church Mutual the right to investigate and evaluate the claim fully including inspecting the damaged property and conducting necessary tests. Church Mutual also denied the claim based upon several exceptions. More specifically, because the policy did not afford coverage for loss or damage caused by: Rust, corrosion, fungus, decay, deterioration, hidden or latent defect . . . ; continuous or repeated seepage or leakage of water that occurs over a period of 14 days or more; [and] faulty, inadequate or defective design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction. Sarver also relied on the exclusion under Limitations 1(c) which excluded coverage for

“The interior of any building or structure caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless: the building or structure first sustains damage by a Covered Cause of Loss to its roof or was through which the rain, snow . . . enters” applied.

He found that the mold had been caused by water infiltration and that there was no evidence of a weather event that caused damage to the building so the exception to that exclusion did not apply. He also noted that the fact that there was three roof coverings removed which he opined contributed to the condition of the building and allowed the leaks and water infiltration to occur.

Sean Sarver testified at his examination-before-trial that mold remediation is not covered under the Church's policy unless the mold was caused by another covered loss. He further testified that water penetration caused by a windstorm is not a covered loss, however he testified that water penetration would be a covered loss "if the wind were to damage the building to allow the water in." He testified that Church Mutual's records indicate that the Church's interior photos of the mold appear to be similar to photos from loss of 2007.

The parties' policy in effect in 2007 and 2008 provided under "Exclusions" that Church Mutual would not pay for loss or damage caused by or resulting from:

- 2d. (1) Wear and Tear;
- (2) Rust, corrosion, fungus, decay, deterioration,
hidden or latent defect . . . ;
- (4) Settling, cracking, shrinking or expansion;
- f. Continuous or repeated seepage or leakage of water
that occurs over a period of 14 days or more;
- 1. Neglect of an insured to use all reasonable means to
save and preserve property from further damage at
and after the time of loss.
- 3c. Faulty, inadequate or defective
 - (2) Design, specifications, workmanship, repair, construction,
renovation, remodeling, grading, compaction;
 - (4) Maintenance.

However, the policy provided that if an excluded cause of loss listed in, inter alia, 3(c) "results in Covered Cause of Loss, [it would pay] for the loss or damage caused by that Covered Cause of Loss." The policy provided under "Limitations" that there was no coverage for damage to

- c. The interior of any building or structure caused by or
resulting from rain, snow, sleet, ice, sand or dust, whether
driven by wind or not, unless: (1) The building or
structure first sustains damage by a Covered Cause of
Loss to its roof or walls through which the rain, snow,

sleet, ice, sand or dust enters.

“On a motion for summary judgment pursuant to CPLR§ 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept 2004), affd as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept 1990).

Contract language in an insurance policy which requires prompt notice of property claims constitutes a condition precedent with which the insured must comply or the contract is vitiated. Argo Corp. v Greater New York Mut. Ins. Co., 4 NY3d 332, 339 (2005), citing Security Mut. Ins. Co. of New York v Acker-Fitzsimmons Corp., 31 NY2d 436-440-443 (1972). “Strict compliance with the contract protects the carrier against fraud or collusion; gives the carrier an opportunity to investigate claims while evidence is fresh; allows the carrier to make an early estimate of potential exposure and establish adequate reserves and gives the carrier an opportunity to exercise early control of claims, which aids settlement.” Argo Corp. v Greater New York Mut. Ins. Co., supra, at p. 339, citing Unigard Sec. Ins. Co. v North Riv. Ins. Co., 79 NY2d 576 (1992). It is not disputed that at the time in question here, a showing of prejudice to the insurance company was not required. Insurance Law § 3420; see, Argo Corp. v Greater New York Mut. Ins. Co., supra, at p. 339.

As for exclusions, not only is their interpretation highly favorable to insureds, “before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation.” Pioneer Tower Owners Assn. v State Farm Fire &

Cas. Co., 12 NY3d 302, 307 (2009), quoting Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 311 (1984). “[E]xclusions or exceptions from policy coverage . . . are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction.” Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co., *supra*, at p. 307. To the extent that there is any ambiguity in an exclusionary clause, it is to be construed in favor of the insured. Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co., *supra*, at p. 307.

Summary judgment in a weather related case is appropriate when a defendant demonstrates through climatological data and expert opinion that the weather conditions preclude a finding that the weather conditions were the cause of the damages. See, Massey v Newburgh W. Realty, Inc., 84 AD3d 564 (1st Dept 2011), citing Perez v Canale, 50 AD3d 437 (1st Dept 2008). While a record of the observations of the weather taken under the direction of the United States Weather Bureau is *prima facie* evidence of the facts stated and constitutes *prima facie* evidence of weather conditions at a particular time and place (CPLR § 4528; Monahan v City of New York, 31 AD2d 933 [2nd Dept 1969]; Schleede v State, 5 Misc 2d 785 [Court of Claims 1957]; NY Jur, Evidence §§ 110, 521, 998), testimony regarding the weather conditions can establish the existence of a material issue of fact as to what caused the damage. Massey v Newburgh W. Realty, Inc., *supra*.

The 2003 Claim

The Church’s 2003 claim is untimely. The Statute of Limitations is six years. CPLR §213(2); Bloom v St. Paul Travelers Companies, Inc., 57 AD3d 819 (2nd Dept 2010), *lv den.*, 15 NY3d 706 (2010). The plaintiff’s claim accrued when Church Mutual denied coverage on September 12, 2003. See, Medical Facilities, Inc. v Pryke, 62 NY2d 716 (1984). While this action was commenced within six years of when the 2003 claim accrued, the 2003 claim was not advanced in the Church’s original complaint. In fact, it was not advanced until January 20, 2011 when the Church interposed its Amended Verified Complaint. And, this claim does not relate back to the original complaint under CPLR § 203(f) because the original complaint did not give notice of the transaction or occurrence out of which the amended claim arises. See, CPLR §203(f).

The 2007 Claim

The insurance policy applicable to the 2007 claim required the Church to give Church Mutual “prompt notice of the loss or damage includ[ing] a description of the property involved” for property

damage claims. Church Mutual has failed to establish that the Church failed to give timely notice of the 2007 claim. It simply relies on Pragias' testimony to the effect that he believed someone from the Church notified Church Mutual. It is Church Mutual's burden in the first instance to establish that it did not receive timely notice. This, it has failed to do.

The 2008 Claim

The insurance policy applicable to the 2008 claim also required the Church to give Church Mutual "prompt notice of the loss or damage includ[ing] a description of the property involved" for property damage claims. There is a question of fact as to when the Church notified Church Mutual of the 2008 claim. While Church Mutual maintains and Sarver testified at his examination-before-trial it was not provided notice until August 29, 2008, Certified Indoor Environmentalist Robert D. Sindone and his Administrative Assistant Darlene Costa have attested to having prepared and mailed a letter to Church Mutual giving notice on the Church's behalf on June 10, 2008 outlining both its claim for water damage and mold. See, Short v Progressive Northwestern Ins. Co., 70 AD3d 1516 (4th Dept 2010).

In view of the fact that there are no sworn statements by either Sindone or Costa which contradict their present attestations regarding notice to Church Mutual, the court cannot disregard their present representations as feigned. Similarly, Pragias' testimony that the first time he notified Church Mutual was on August 29, 2008, does not require that Sindone and Costa's affidavits be disregarded, either. His testimony was regarding when he called. In fact, Pragias testified that he believed that Duraclean was given notice and that he called to inquire as to why no one had responded. Similarly, the Church's failure to produce Duraclean's letter in response to Church Mutual's Disclaimer Notice does not establish that the issue is feigned nor does Duraclean's interest in procuring payment by Church Mutual render their employees' representations feigned as a matter of law.

There is also an issue of fact as to whether the 2008 damage comes within a policy exclusion or an exception thereto. While the policy excludes coverage for damages caused to "the interior of any building or structure caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not," that exclusion does not apply if "the building or structure first sustain[ed] damage by a Covered Cause of Loss to its roof or walls through which the rain . . . enters." The

policy as well as Church Mutual's representative Sean Sarver's testimony at his examination-before-trial establishes that damages from water penetration is covered under the policy if wind damaged the building and allowed rain/water in and that mold remediation as a result would be covered, too.

The expert on whom Church Mutual relies did not see the Church in its original damaged condition. His inspection was made following emergency repairs to the Church's roof. He has not addressed photographs of the flat roof which were taken before the repairs were done which reveal damage to the roof. This results in a failure by Church Mutual to establish its entitlement to summary judgment with respect to the 2008 claim.

Moreover, contrary to Church Mutual's position, the Church's failure to establish that a "windstorm" or "storm" occurred at the time in question does not establish that there is no coverage under the policy. The burden to establish a lack of coverage rests with Church Mutual at this juncture. In any event, Church Mutual's reliance on the lack of empirical evidence that there was a "windstorm" in May/June 2008 fails. The policy does not require that the damage be the result of a "windstorm" or "storm." In fact, Sarver testified that water penetration caused by wind would be a covered loss "if the wind were to damage the building to allow the water in."

Even assuming, arguendo, that Church Mutual has met its burden, the Church has clearly established the existence of a material issue of fact with respect to coverage for the 2008 incident. "Wind" damage is a covered loss and the exclusion of damage to the interior of a building from rain does not apply if the building first sustained damage on a covered cause of loss to its roof through which rain enters.

In view of the foregoing, an issue of fact exists as to whether the 2003 and 2008 claims are covered under the policy.

In conclusion, it is hereby declared that Church Mutual does not have an obligation under its policy with the Church to pay damages for the Church's 2003 claim because it is barred by the Statute of Limitations.

This constitutes the decision and order of this Court.

DATED: February 15, 2012

ENTER

ENTERED

FEB 17 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE¹¹


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J. S.C.

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