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SHORT FORM ORDER

INDEX No. 10-2919

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-27-12
ADJ. DATE 11-29-12
Mot. Seq. # 007 - MG CDISP

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COPACABANA REALTY LLC,

Plaintiff,

- against -

FIREMAN'S FUND INSURANCE COMPANY and AMERICAN AUTOMOBILE INSURANCE COMPANY,

Defendants.

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Upon the following papers numbered 1 to 31 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 20 - 27 ; Replying Affidavits and supporting papers 28 - 29 ; Other plaintiff's memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant American Automobile Insurance Company for summary judgment in its favor dismissing the complaint against it is granted.

This action arises out of the alleged breach of a homeowner's insurance agreement covering a single family residence located at 757 Daniels Lane, Sagaponack, New York. Plaintiff Copacabana Realty, LLC, alleges that it is the assignee of J. Darius Bikoff and Jill Bikoff, who, on January 4, 2009 were issued a "Prestige Home" insurance policy by defendants Fireman's Fund Insurance Company ("FFIC") and American Automobile Insurance Company ("AAIC") covering said residence. On October 2, 2009, plaintiff filed a proof of loss with the defendants regarding alleged damages it incurred as a result of faulty renovations made to the subject premises. Following an inspection of the premises by a claims adjuster, AAIC issued a letter to plaintiff disclaiming coverage of the alleged loss on the ground the subject insurance policy specifically excludes damage to the premises caused by faulty construction and defective workmanship. By its amended complaint, plaintiff alleges, inter alia, that defendants breached their

contractual obligation by wrongfully refusing to cover the damage to the subject premises despite receiving timely notice of the loss. The amended complaint also seeks a judgment declaring that the defendants are obligated "to cover the physical damage and loss sustained by the plaintiff."

By order dated August 25, 2010, this court granted a motion by defendant FFIC for judgment in its favor dismissing the complaint against it on the grounds FFIC did not underwrite the subject policy and shared no contractual relationship with the plaintiff. However, the action was continued against AAIC, which now moves for summary judgment in its favor dismissing the complaint. AAIC asserts that it correctly disclaimed coverage, as the damage to the premises, which included, inter alia, sloping floors on the first and second floor of the building, was caused by the faulty workmanship of independent contractors hired by plaintiff to perform renovations to the premises. AAIC further asserts that the alleged loss does not fall within its coverage for property damage attributable to a collapse, since there has been no collapse at the premises as that term is defined by plaintiff's insurance policy.

Plaintiff opposes the motion, arguing that a triable issue exists as to whether the faulty workmanship exclusion contained in the parties' agreement excludes ensuing losses which arise from the effects of such work. Plaintiff also argues that AAIC's disclaimer is defective since it erroneously attributes the denial of coverage to "improper construction or workmanship," rather than the " faulty, inadequate or defective workmanship" stated in the agreement. In addition, plaintiff argues that defendant waived any exclusion related to the alleged collapse of the building by failing to list such exclusion in its disclaimer, and that a triable issue exists as to whether the property damage is attributable to a collapse, as a plaintiff need not await total collapse of a building to be eligible for such coverage.

At his examination before trial, Kevin Buckley testified that he was the claims adjuster assigned to handle and investigate plaintiff's claim on behalf of AAIC, and that he conducted an independent inspection to assess the damage at the premises. Mr. Buckley testified that the homeowners, their engineer and the insurance agent were present during the inspection, and that he observed that the kitchen floor had gaps and was sagging in the middle of the room. Mr. Buckley testified that during an inspection of the joists below the kitchen floor, he observed that holes had been made in them to facilitate electrical wiring and plumbing, and that floor jacks and lumber had been placed perpendicular to the joists to further support the floor. Mr. Buckley further testified that, based on his observations, he determined that the property damage was not covered because damage arising from faulty workmanship and construction is specifically excluded by plaintiff's policy.

At his examination before trial, Jay Bikoff testified that the subject premises was in need of extensive renovation when it was purchased, and that he hired a project manager and several contractors to perform the work. Mr. Bikoff testified that the contractors performed shoddy work, and that several defects in the house, including the sagging kitchen floor, became apparent during the renovation. Mr. Bikoff testified that despite moving out of the premises so the problems could be fixed, some of the problems became progressively worse upon his return to the property. Mr. Bikoff further testified that a review by an independent general contractor found that the previous contractors were negligent in almost every aspect of the work they performed.

AAIC's letter disclaiming coverage of plaintiff's loss states, inter alia, that "[t]he description of loss indicated your kitchen floor has settled due to improper or inadequate construction. . . We inspected you residence with your agent, Alan Benet, CFO Hanan Goldenthal and caretaker Christopher on October 6, 2009 . . . Based on this inspection, it is our opinion that the damage is related to improper construction and or workmanship by the contractor. Unfortunately, this loss is not covered under your insurance policy." Additionally, while the letter states that the kitchen floor has settled due to "improper or inadequate construction and or workmanship," it further sets forth the full text of the "defective or inadequate workmanship" exclusion.

The section of the agreement entitled "Additional Property Coverages" states, in pertinent part, as follows:

> We cover direct physical loss to covered property that results from a collapse caused by . . . use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of construction, remodeling or renovation.

The insurance agreement further defines collapse as:

> the actual, abrupt falling down of a building or part of a building. A collapse occurs only when a building or part of a building has actually and abruptly fallen down. Collapse does not mean a condition of a building including cracking, bulging, sagging, bending, shifting, leaning, settling, shrinkage, or expansion, that could lead to or contribute to its actual, abrupt falling down

The section of the agreement entitled "Property Losses not Covered," provides, inter alia, that the insurer:

> will not pay loss caused by or resulting from any of the following: . . . inherent vice, hidden or latent defect or any quality in property that causes it to damage or destroy itself . . . settling, shrinking, bulging or expansion, including resultant cracking, or the activity or growth of roots from plants, trees, or shrubs to pavements, patios, foundations, walls, floors, roofs or ceilings. . .We do not cover losses caused by. . . faulty, inadequate or defective . . . design, specifications, workmanship, repair, construction, renovation, remodeling

Where an insurer denies coverage based upon an exclusion, the burden is on the insurer to demonstrate that the exclusion applies in the particular case and that it is "subject to no other reasonable interpretation" (***Seaboard Sur. Co. v Gillette Co.***, 64 NY2d 304, 311, 486 NYS2d 873 [1984]). "An exclusion from coverage must be specific and clear in order to be enforced, and an ambiguity in an exclusionary clause must be construed most strongly against the insurer. However, an unambiguous policy provision must be accorded its plain and ordinary meaning, and a court may not disregard the plain meaning of the policy's language in order to find an ambiguity where none exists" (***Seaboard Sur. Co. v Gillette Co.***, *supra* at 311, 486 NYS2d 873; *see* ***Guachichulca v Laszlo N. Tauber & Assoc., LLC***, 37 AD3d 760, 831 NYS2d 234 [2d Dept 2007]; ***Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.***, 60 NY2d 390, 398, 469 NYS2d 655 [1983]; ***Wilner v Allstate Ins. Co.***, 99 AD3d 700, 953 NYS2d 49 [2d Dept 2012]).

Here, AAIC established its prima facie entitlement to summary judgment dismissing the complaint by demonstrating that its defective or inadequate workmanship exclusion clearly and unambiguously applies to plaintiff's property damage (*see* ***Seaboard Sur. Co. v Gillette Co.***, *supra*; ***Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.***, *supra*; ***Guachichulca v Laszlo N. Tauber & Assoc., LLC***, *supra*). Significantly, the plain words of the agreement specifically exclude property damage caused by "faulty, inadequate or defective workmanship." Moreover, the post-inspection report prepared by Kevin Buckley and the deposition testimony of Jay Bikoff both confirm that the damage to the property arose from inadequate and defective workmanship by contractors who were hired to make major repairs and renovations to the premises.

In opposition plaintiff fails to raise a triable issue of fact warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NYS2d 557, 427 NYS2d 595 [1980]). Contrary to plaintiff's assertion, the case of ***Laquilla Constr. Inc. v Travelers Indem. Co.***, 66 F Supp 2d 543 (S.D. N.Y. 1999) does not require a different outcome, as the district court specifically noted that the ensuing loss exception in that case should not be read so broadly that it swallowed the exclusionary clause contained in the insurance agreement and granted the insurers' motion for summary judgment dismissing the complaint against it. Although the court notes that an ensuing loss claim may be appropriate where the initial defect caused wholly separate damage to another portion of the building's structure, where, as in this case, there was no such collateral or subsequent damage, the ensuing loss exception does not apply (*see* ***Rapid Park Industries v. Great Northern Ins. Co.***, __ Fed. Appx. __, 2012 WL 5458023 [2d Cir. 2012]; ***ITT Indus. v Factory Mut. Ins. Co.***, 303 AD2d 177, 756 NYS2d 188 [1st Dept 1995]; ***Narob Dev. Corp. v Insurance Co. of N. Am.***, 219 AD2d 454, 631 NYS2d 155 [1st Dept 1995]). Further, inasmuch as the ensuing loss provision is inapplicable under the circumstances of this case, plaintiff's argument concerning alleged ambiguities between the term "ensues" and "ensuing" is unavailing.

Plaintiff's reliance on coverage provided for property damage caused by a collapse on the premises also lacks merit (*see* ***Rapp B. Props., LLC v. RLI Ins. Co.***, 65 AD3d 923, 885 NYS2d 283 [1st Dept 2009]; ***Rector St. Food Enters., Ltd. v. Fire & Cas. Ins. Co. of Conn.***, 35 AD3d 177, 827 NYS2d 18 [1st Dept 2006]). Although the agreement provides coverage for a collapse that results from the use of defective material or methods in construction or renovation, the agreement specifically limits coverage to a collapse that "occurs during the course of such construction." Moreover, the agreement defines collapse as "the actual, abrupt falling down of a building or part of a building." Indeed, the agreement states that the term collapse does not refer to any "cracking, bulging, sagging, bending, shifting, leaning, settling, shrinkage, or expansion, that could lead to or contribute to its actual, abrupt falling down." Although the court is aware of the Appellate Division Third Department's holding in ***Royal Indem. Co. v Grunberg***, 155 AD2d 187, 553 NYS2d 527 (3d Dept 1990) where it found that a "substantial impairment of the structural integrity" of a premises was sufficient to constitute a collapse, that holding is inapplicable where, as here, the language of the subject agreement unambiguously limits collapse to an "abrupt falling," and excludes "cracking, bulging and settling" as sufficient indicia of a collapse (*see eg.* ***Rapp B. Props., LLC v RLI Ins. Co.***, *supra*; ***Rector St. Food Enters., Ltd. v Fire & Cas. Ins. Co. of Conn.***, *supra*; ***Residential Management (N.Y.) Inc. v Federal Ins. Co.***, 884 F Supp 2d 3 [E.D. N.Y. 2012]; *see* ***Dalton v Harleysville Worcester Mut. Ins. Co.***, 557 F3d 88 [2d Cir. 2009]).

Accordingly, the motion by defendant American Automobile Insurance Company for summary judgment in its favor dismissing the complaint against it is granted.

Dated: April 29, 2013

J.S.C.

__XX__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**