Valle v New York Prop. Ins. Underwriting Assn.
2016 NY Slip Op 30751(U)
April 25, 2016
Supreme Court, New York County
Docket Number: 651798/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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JARED DELLA VALLE, CAROLINE DELLA VALLE,
CRAIG DELLA VALLE,

Plaintiffs, INDEX NO. 651798/13

-against-

NEW YORK PROPERTY INSURANCE
UNDERWRITING ASSOCIATION,

Defendant,

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JOAN A. MADDEN, J.:

This is an action for breach of contract seeking insurance coverage for damage to plaintiffs' house on Fire Island caused during Hurricane Sandy on October 29, 2012. Defendant New York Property Insurance Underwriting Association moves for summary judgment on its first affirmative defense based on the policy's water exclusion endorsement and seeks an order dismissing the complaint and declaring that it has no liability to indemnify plaintiffs. Plaintiffs oppose the motion and cross-move for partial summary judgment as to liability on their breach of contract claim.

Defendant's policy provided $600,000 coverage for plaintiffs' house and $40,000 for contents and loss of rental income. Plaintiffs also had a policy of flood insurance with Travelers Insurance Company, and received the full limits of the policy --- $250,000 for the structure and $56,300 for personal property. Defendant paid a portion of plaintiffs' claim in the amount of $13,155 for damage to the roof of their house, which defendant determined was "clearly damaged only by wind." Plaintiffs commenced this action in May 2013, The complaint asserts one cause of action for breach of contract, alleging that defendant failed to indemnify them

adequately for the damage caused by windstorm and that they are entitled to $249,829 for building loss, $40,071 for personal property loss, and $63,800 for loss of rental income.

Defendant is moving for summary judgment dismissing the complaint, asserting that other than coverage for damage to the roof caused solely by wind, plaintiffs' claim is excluded based on the water exclusion endorsement in the policy which excludes any damage caused by flood, tidal waters and storm surge, to any extent even if there are multiple causes of the damage. Relying on policy language that is commonly known as an "anti-concurrent causation clause," defendant argues that when multiple causes are responsible for a specific loss, so long as one of the contributing causes is an excluded cause, the loss is not covered and the exclusionary language applies. Defendant asserts that since plaintiffs admit that their house was destroyed by a combination of flood water, storm surge and wind, and even though defendant disputes the extent to which wind contributed to such destruction, for the purposes of this motion even if wind were a factor in causing the loss, since forces of the flood, tidal water and storm surge were a contributing factor, under the anti-concurrent causation clause, the loss is excluded.

In opposition to defendant's motion and support of their cross-motion for summary judgment, plaintiffs argue that their claim for coverage is not a "concurrent loss" within the meaning of the anti-concurrent causation clause, since they assert the loss is limited to windstorm damage. Plaintiffs allege that their house was damaged when wind alone caused the second floor of the neighboring house at 4 Traffic Street "to lift and separate from the rest of that structure" and strike the roof and southwest corner of their house, splitting it in two, knocking it off its pilings onto the ground, and ultimately subjecting it to water damage when "it toppled into the ocean." Plaintiffs contend that on these facts, "a covered windstorm caused the loss to 38

Superior," since the windstorm loss "occurred *before* the house was caused to fall onto the ground and [be] affected by the water" (emphasis added). Plaintiffs contend that a concurrent cause is not involved, since any damage from water or storm surge did not occur until *after* the house suffered structural damage as a result of windstorm. Plaintiffs further contend that by paying for the damage to the roof as a "windstorm only loss," defendant acknowledged that the "cause of the impact was due to 'windstorm.'"

The proponent of a motion for summary judgment "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. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986); see also Winegrad v. New York University Medical Center, 64 NY2d 851, 852 (1985). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. See Alvarez v. Prospect Hospital, supra at 324.

Under well settled principles governing the interpretation of insurance contracts, the unambiguous provisions of an insurance policy must be accorded their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court. See 2619 Realty, LLC v. Fidelity & Guaranty Insurance Co, 303 AD2d 299, 300 (1st Dept), lv app den 100 NY2d 508 (2003); Ford Motor Credit Co v. Atlantic Mutual Insurance Co, 294 AD2d 206 (1st Dept 2002). "A court may neither make nor vary an insurance contract by extending coverage beyond the fair intent and meaning of the agreement, and the liability of the insurer cannot be enlarged by implication beyond the express terms of the contract." Moshiko, Inc v. Seiger &

Smith, Inc, 137 AD2d 170, 175 (1st Dept), aff'd 72 NY2d 945 (1988). The court may not find an ambiguity in an insurance policy where none exists, but when a question is raised as to the meaning of a particular provision, or the provision is susceptible to more than one reasonable interpretation, all ambiguities must be resolved against the insurer, the drafter of the language. See Raner v. Security Mutual Insurance Co, 102 AD3d 485 (1st Dept 2013). This is particularly true of exclusion clauses, which are always, as a matter of interpretation, strictly construed against the insurer. See Cone v. Nationwide Mutual Fire Insurance Co, 75 NY2d 747 (1989). "Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage." Consolidated Edison Co v. Allstate Insurance Co, 98 NY2d 208 (2002); see Jacobson Family Investments Inc v. National Union Fire Insurance Co, 129 AD3d 556 (1st Dept 2015).

Here, in denying coverage, defendant relies on the water exclusion endorsement and the anti-concurrent causation clause. The General Exclusions portion of the policy begins with the anti-concurrent causation language, which states as follows:

> We do not insure for loss caused directly or indirectly by any of the following [a list of nine specific exclusions, including "water damage"]. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusion apply whether or not the loss event results in widespread damage or affects a substantial area.

"Water damage" as defined in the General Exclusions has been replaced by a Water Exclusion Endorsement, which states, in relevant part that "water" means "[f]lood, surface water, wave, including tidal wave and tsunami, tides, tidal water, overflow or any body of water or spray from any of these, all whether or not driven by wind, including storm surge."

An anti-concurrent causation provision applies only to multiple concurrent or sequential causes of the *same* loss or damage, i.e. when multiple forces lead to a single direct physical loss or damage to property. See 5-44 Appleman on Insurance §44.04, *Anti-Concurrent Cause Clauses;* David P. Rossmiller, *Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina Cases and Beyond,* New Appleman on Insurance: Current Critical Issues in Insurance Law (2007); David P. Rossmiller, *Anti-Concurrent Cause Language,* 32-192 Appleman on Insurance §192.03. The provision precludes coverage for losses that would not have occurred except for an excluded peril working "concurrently or in sequence" with another non-excluded peril. See 5-44 Appleman on Insurance §44.04, supra; see also Dickinson v. Nationwide Mutual Fire Insurance Co, 2008 WL 1913957 (USDC SD Miss 2008); Clarke v. Travco Insurance Co, 2015 WL 4739978 (USDC SDNY 2007). It does not apply when separate and distinct losses are caused by separate and distinct perils or physical forces. See 5-44 Appleman on Insurance §44.04, supra; see also Quanta Indemnity Co v. Amberwood Development Inc, 2014 WL 1246144 (USDC D Ariz 2014); Robichaux v. Nationwide Mutual Fire Insurance Co, 81 So3d 1030 (Sup Ct, Miss 2011); Maxus Realty Trust, Inc v. RSUI Indemnity Co, 2007 WL 4468697 (USDC WD Mo 2007). For example, if a non-excluded peril such as wind causes one type of damage and an excluded peril such as flood causes a separate type of damage, the wind-caused damage is covered and the flood-caused damage is excluded, and the anti-concurrent cause provision does not come into play. See 5-44 Appleman on Insurance §44.04, supra; Corban v. United Services Automobile Ass'n, 20 So3d 601 (Sup Ct Miss 2009).

As to the purpose of including anti-concurrent causation language in an insurance policy, one commentator explains that in the 1980s, insurance companies began adding such language to their policies to eliminate the use of the efficient proximate cause doctrine, which courts had employed to analyze multiple causes of the same loss. See 32-192 Appleman on Insurance §192.03, supra; see *also* Dale Joseph Gilsinger, *Validity, Construction and Application of Anticoncurrent Causation (ACC) Clauses in Insurance Policies*, 37 ALR6th 657; Couch on Insurance, §101.56, *Policy language addressing multiple causation* (3rd ed); Prof. Robert H. Jerry, II, *Dominance: Assessing the Significance of Nonremote* Causes, 3-48 Insuring Real Property §48.03 (2015). These treatises cite numerous decisions from state and federal courts around the country concluding that the language of an anti-concurrent causation clause reflects an intent to contract out of and negate the application of the efficient proximate cause doctrine. Apparently, only one court in New York has addressed this issue. In Kula v. State Farm Fire & Casualty Co, 212 AD2d 16 (4th Dept 1995), lv app dism 87 NY2d 953 (1996), the Appellate Division Fourth Department held that the efficient proximate cause doctrine could not be used to "circumvent" the unambiguous language of the "lead-in" or anti-concurrent causation clause in the policy. Id at 21-22.[1]

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[1]Kula refers to the anti-concurrent causation clause as the "lead-in clause" and involves an exclusion for "earth movement." Kula v. State Farm Fire & Casualty Co, supra at 19. The decision notes that such language is a "relatively recent addition by State Farm in its policies, [which] clearly excludes from coverage any loss from earth movement, combined with water, regardless of cause," and cites State Farm Fire & Casualty Co v. Martin, 668 FSupp 1379, 1382 (CD Cal 1987), aff'd 872 F2d 319 (9th Cir 1989) and Millar v. State Farm Fire & Casualty Co, 167 Ariz 93 (Ct App Ariz 1990), review den 168 Ariz 144 (Sup Ct Ariz 1991); Kula v. State Farm Fire & Casualty Co, supra at 19-20.

New York courts have relied on anti-concurrent causation provisions to determine that coverage is excluded. See Cali v. Merrimack Mutual Fire Insurance Co, 43 AD3d 415 (2nd Dept 2007), lv app den 9 NY3d 818 (2008); Casey v. General Accident Insurance Co, 178 AD2d 1001 (4th Dept 1991); Audrey's Management LLC v. Admiral Insurance Co, 2009 WL 7015462 (Sup Ct, West Co 2009); Clarke v. Travco Insurance Co, supra; Coney Island Auto Parts Unlimited, Inc v Charter Oak Fire Insurance Co, 619 Fed Appx 28 (2nd Cir 2015). Courts in New York have also held that anti-concurrent causation provisions are not ambiguous. See Cali v. Merrimack Mutual Fire Insurance Co, supra; Kula v. State Farm Fire & Casualty Co, supra; Clarke v. Travco Insurance Co, supra; but see Corban v. United Services Automobile Ass'n, supra.

Here, the parties do not dispute that causation is the determinative issue. Defendant contends that the loss was caused by water alone, which is excluded, or even if the loss were caused by wind in combination with water, those are multiple causes that are excluded under the anti-concurrent causation clause. Plaintiff, on the other hand, relies on the efficient proximate cause doctrine, but as noted above, such reliance is misplaced in view of the anti-concurrent causation language in the policy. See Kula v. State Farm Fire & Casualty Co, supra. Nevertheless, leaving aside efficient proximate cause, plaintiffs have made clear that they are seeking coverage for "direct physical loss due to windstorm" alone, alleging that wind, by itself, caused the second story of the 4 Traffic house to become dislodged and collide with plaintiffs' house, thereby rendering their house structurally unsound and unsalvageable *before* it fell to the ground and was subject to the forces of water. Plaintiffs contend they are entitled to coverage for loss caused solely by windstorm, a covered peril, which they assert occurred before any damage caused by water. On these facts, since plaintiffs essentially contend they suffered two distinct

losses, caused by two separate perils, resulting in different damage, the water damage exclusion and the anti-concurrent causation clause would not apply to exclude coverage. See 5-44 Appleman on Insurance §44.04, supra. Quanta Indemnity Co v. Amberwood Development Inc, supra; Robichaux v. Nationwide Mutual Fire Insurance Co, supra; Maxus Realty Trust, Inc v. RSUI Indemnity Co, supra.

Plaintiffs cite Throgs Neck Bagels, Inc v. GA Insurance Co, 241 AD2d 66 (1st Dept 1998), where the First Department Appellate Division held that a Department of Buildings vacate order was not a contributing cause of the loss, so the law or ordinance exclusion, which included anti-concurrent causation language, was not applicable to deny coverage for loss due to fire, a covered peril. In that case, the insurer failed to meet its burden of establishing a contributing cause to the loss. In the instant action, however, the issue of causation is sharply disputed, and since no witnesses were present when Hurricane Sandy struck plaintiffs' house, both sides must rely on the opinions of experts.

Plaintiffs submit reports from two structural engineers, Nat Oppenheimer, P.E. of Robert Silman Associates and Jamie Ho, P.E. of Rand Engineering & Architecture, and an affidavit from Louis Matthew Frabizio, a Licensed Home Improvement Contractor. Oppenheimer states that "the initial damage (the splitting of [plaintiff's] house in two) was likely due to the direct impact of the second floor of the neighboring house (4 Traffic)" and [b]ased on the original and current location of the second story of the house originally at 4 Traffic, it is our professional opinion that the second floor of 4 Traffic caused the most significant damage to 38 Superior Street in the form of flying debris rendering the properly unsalvageable." Oppenheimer further states that the second floor of 4 Traffic, "while intact appears to have flown into the Subject

Property directly impacting the South West Corner." Noting that the first floor of 4 Traffic "was no where to be found," Oppenheimer states that an inspection of the remaining portion of 4 Traffic showed no "visible signs of waterline" and "unusual construction technology utilized in its erection and . . . the complete absence of hurricane straps or tie down hardware." He concludes as follows:

> In our professional opinion, and based on the evidence noted herein, it is likely that the second story of 4 Traffic sheared clean off of the first story, impacting the roof and south west corner of the subject property and caused the first and dominant damage to 38 Superior Street. The impact knocked the property off of the pilings onto the ground ultimately subjecting it to the forces of flood. The visible signs of impact including shingles from 38 Superior lodged in the lower 3' of the second floor of 4 Traffic and the structural damage to the roof and wall of 38 Superior approximately 8' above grade, the current position of the houses relative to each other, the absence of any evidence of the first floor of 4 Traffic and the final resting positions of both the 1 and 2 story potions of the subject property indicate that a significant impact (in the form of large flying debris – 4 Traffic) was the direct first and dominant cause of damage.

Plaintiffs' second engineer, Jamie Ho, submits a report explaining that she evaluated the property to determine whether wind gusts during Hurricane Sandy caused the dislodging of the second floor of the 4 Traffic house. She states that a senior architect with their firm, Bill Verney, visited the site on December 12, 2012 and notes Verney's observations as to both properties. She details the weather data from the day of the storm, including the speed of the wind and wind gusts, and the size of the storm surge, and explains that such data was used to analyze and calculate the "wind loads" on 4 Traffic. Specifically with respect to wind, engineer Ho makes the following observations:

> Based on data from the Weather Underground, a maximum wind gust of 81 mph occurred at 6:10 PM at the nearest station in Islip, NY (figure 2). These gusts preceded the maximum observed storm surge of approximately seven feet in Montauk, NY by 50 minutes; this surge occurred at 7 PM according to data from the National Oceanic and Atmospheric Administration (NOAA).

> Wind gusts during Storm Sandy were 68% greater than the next largest recorded wind event to which the house at 4 Traffic Avenue had ever been exposed (Hurricane Irene, 48 MPH wind gusts).
> The subject properties are seaward of the Islip weather station, and therefore likely to have experienced higher wind gusts than recorded at the weather station.

Ho concludes as follows:

> Based on our observations and calculations, we believe that wind gusts during Storm Standy were of sufficient magnitude to have dislodged the second story of 4 Traffic Avenue from its first story, based upon the following:
>
> The maximum recorded wind gusts preceded the maximum observed storm surge.
> The wind gusts during Storm Standy were 68% greater that the next largest recorded wind event to which the house at 4 Traffic Avenue had ever been exposed.
> 4 Traffic Avenue had limited capacity to resist lateral wind load, due to the absence of hurricane straps or ties.
> Though the actual wind speeds that 4 Traffic Avenue experienced were likely higher that those recorded, due to the weather station being inland of the house, the actual recorded wind speed alone produced sufficient horizontal lateral force to overcome the shear capacity of the existing structure by 50%.

Plaintiffs also submit an affidavit from home improvement contractor Frabizio, who states that he has been employed in construction industry for 14 years," and is "intimately familiar" with the area of 38 Superior Street, both prior to and following Hurricane Sandy. He explains that for eight summers from 2005 to 2012, he rented the house at 34 Superior Street, which is next to plaintiff's house and he also served as a member of the Fire Department and "the team that helped made Fire Island safe after Hurricane Sandy, including the area in and around Superior Street." Frabizio states that he "personally repaired 3 out of the 4 storm damaged homes immediately adjacent to or across the street from 38 Superior Street," and "relocated more than 12 houses on Fire Island in the winter 2013-2014." He also states that he inspected 38 Superior "before the cleanup and repair activities were completed, and after the cleanup," and was present when the house was demolished. Frabizio states that based on his "16 years of

experience in the construction industry, and having lived on Fire Island, I am extremely familiar with the repair and identification of flood damage." He states that immediately following Hurricane Sandy, he viewed the damage to plaintiff's house and the surrounding area, and "immediately noticed" that the damage to 38 Superior "was different from the other homes because it was not carried by flood water, but had been struck by the second floor of 4 Traffic Avenue." He states he inspected the interior of 38 Superior, and the interior and exterior of the top half of 4 Traffic, and observed that the second floor of both buildings "did not have any flood line, thereby indicating to me that they were not carried by the flood waters to their post-loss positions," and in contrast, the first floor of 38 Superior had a "flood line indicating that it had sustained flood damage." Estimating that the flood damage to the house totaled $251,750 "at repair cost," Fabrizio takes the replacement cost of $559,600, deducts depreciation of $46,615, to arrive at the "actual cash value" of $512,985. He then deducts his flood damage estimate of $251,750, which leaves $261,235, which he concludes is the amount of "damage solely as a result of windstorm to the remainder of the house."

In reply and opposition to plaintiffs' cross-motion, defendant submits an affidavit and expert reports from its own engineer, Andrew Osborn of WFE Engineers and Architects.[2] Osborn states that when his firm was hired to investigate plaintiffs' claim, the house had already been demolished, so they did not visit the site, but reviewed certain documents: reports prepared by plaintiff's engineer, Oppenheimer; a property value appraisal prepared by Street Links; an insurance adjuster's report; and several reports prepared by JS Held, including a cash value

[2]Although defendant's original motion does not rely on the opinions of any experts, defendant's opposition to plaintiff's cross-motion includes expert's reports .

report, a wind damage estimate and a narrative report. Osborn states that he agrees that "the second floor of 4 Traffic became dislodged from the first floor and displaced about 100 ft northwest, impacting the southwest corner of 38 Superior along the way," but "strongly" disagrees that "wind forces were sufficient to cause the dislodgment." Rather, he opines that the storm surge and wave data "indicate that the first floor [of 4 Traffic] was impacted by storm surge and the first and second floors of 4 Traffic were bombarded by waves," which caused the "first floor to collapse, thereby separating it from the foundation and second floor, and allowing the second floor to subside into the floor waters," and 4 Traffic "now buoyant, moved to the northwest by wave and wind action, eventually impacting the 38 Superior building before coming to rest west of the 38 Superior building." In the alternative, Osborn opines that even if wind forces were sufficient "to lift or push" the second floor off the first floor of 4 Traffic, "the sustained winds (about 55 mph) were insufficient to propel the second floor 60 ft through the air to impact 38 Superior."

The foregoing expert affidavits and reports advance different theories as to the circumstances surrounding plaintiffs' loss and how it occurred. The experts sharply disagree as to whether wind alone, or waves and storm surge caused the second story of the 4 Traffic house to separate from the first story and come into contact with and damage plaintiffs' house. In evaluating the proof submitted by the parties, it must be emphasized that plaintiffs contend they are entitled to coverage for damage caused solely by wind, and do not argue they are entitled to coverage for water damage. Under these circumstances, the experts' conflicting affidavits and reports raise material issues of fact as to the question of causation which cannot be resolved in the context of summary judgment motions. See Hernandez v. 21 Realty Co, 113 AD3d 503 (1st

Dept 2014); Bradley v. Soundview Healthcenter, 4 AD3d 194 (1st Dept 2004). Thus, defendant's motion and plaintiffs' cross-motion must be denied.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment is denied; and it is further

ORDERED that the parties shall proceed forthwith to mediation.

DATED: April 25, 2016

ENTER:

J.S.C.

HON. JOAN A. MADDEN
J.S.C.