SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

ILLINOIS UNION INSURANCE COMPANY and GREAT AMERICAN INSURANCE COMPANY OF NEW YORK,

Plaintiffs,

-against-

GRANDVIEW PALACE CONDOMINIUMS ASSOCIATION CORPORATION a/k/a GRANDVIEW PALACE OF NEW YORK CONDOMINIUM,

Defendant.

WESTERN HERITAGE INSURANCE COMPANY,

Plaintiff,

-against-

GRANDVIEW PALACE OF NEW YORK CONDOMINIUM,

Defendant.

NATIONAL SURETY CORP.,

Plaintiff,

-against-

GRANDVIEW PALACE CONDOMINIUMS ASSOCIATION CORP. a/k/a GRANDVIEW PALACE OF NEW YORK CONDOMINIUMS,

Defendants.

GRANDVIEW PALACE OF NEW YORK CONDOMINIUMS,

Plaintiff,

Index No.: 155113/2012

Mtn Seq. No. 010 & 011

DECISION AND ORDER

Index No.: 650748/2014

-against-

OTT INSURANCE AGENCY,

Defendant.

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JEFFREY K. OING, J.:

These four consolidated insurance coverage declaratory judgment actions arise out of a fire that occurred on April 14, 2012 (the "fire"), causing the near-complete destruction of the approximately 400-unit Grandview Palace condominium complex in Liberty, New York ("Grandview Palace") owned by defendant Grandview Palace Condominiums Association, Inc. ("Grandview").

Motion sequence numbers 010 and 011, which seek summary judgment and partial summary judgment, respectively, are addressed only to the first action and are consolidated for disposition herein.

Background

The fire originated in the old boiler room in the basement of the partially sprinkled "C" building within Grandview Palace and rapidly spread, eventually causing damage to every building within the property (Silverberg Affirm., Ex. 11, pp. 72-75; Ex. 18; Ex. 6). The fire completely destroyed nine buildings. Grandview estimates that the cost of repairing or replacing the

damaged buildings would be approximately $47 million (Silverberg Affirm., Ex. 6).

One of the primary bases for plaintiff insurers' refusal to pay Grandview's claim is Grandview's alleged breach of a Protective Safeguards Endorsement (the "PSE"), which provides a warranty regarding sprinkler coverage at Grandview Palace (Farrell Affirm., Ex. A, pp. 556-557). The PSE is contained in the policy issued by plaintiff Illinois Union Insurance Company ("Illinois Union") to Grandview that was in effect at the time of the fire (the "Illinois Union Policy") (Farrell Affirm., Ex. A). The PSE warrants the existence and maintenance of sprinklers, fire alarms, central station monitoring, and fire and building code compliance. The Illinois Union Policy, number D37389717001, was effective September 9, 2011 through May 12, 2012, and provided $10 million in primary coverage to Grandview.

Plaintiff Great American Insurance Company of New York ("Great American") issued an excess policy, number CPP 8-63-59-09-02 (the "Great American Policy") to Grandview, which provided $20 million in excess coverage (Farrell Affirm., Ex. F). The Great American excess policy was initially the excess policy to the primary policy issued by Aspen American Insurance Company for the period May 21, 2011 to May 21, 2012 (Id., Endt. 1). When Aspen cancelled that policy mid-term and Illinois Union became

the primary carrier for the period beginning September 9, 2011 and ending May 21, 2011, Great American issued a new endorsement listing Illinois Union as the primary policy (Id., Endt. 3). The Aspen policy did not contain a PSE. When Illinois Union replaced Aspen as the primary insurer, adding a PSE, Great American did not return any premium to Grandview to reflect the presumably narrower coverage, nor did Great American notify Grandview that it was narrowing its coverage mid-term. Illinois Union claims that whether or not the primary policy contained a PSE is not relevant because it simply incorporated the terms of the primary policy as its policy, relying on the primary insurer to set the applicable terms and conditions.

The Illinois Union Policy includes the Illinois standard form PSE endorsement (IL04150498), providing, as pertinent, that: "[a]s a condition of this insurance, you are required to maintain ... [an] Automatic Sprinkler System, including related supervisory services" (Farrell Affirm., Ex. A, § A(1)-(2); Silverberg Affirm., Ex. 4, § A(1)-(2), "GA Underwriting 000056").

The PSE defines an "automatic sprinkler system" as:

> a. Any automatic fire protective or extinguishing system, including connected:
>
> (1) sprinklers and discharge nozzles;
> (2) ducts, pipes, valves and fittings;
> (3) tanks, their component parts and supports; and
> (4) pumps and private fire protection mains.

[AND/OR]

b. When supplied from an automatic fire protective system:
(1) non-automatic fire protective systems; and
(2) hydrants, standpipes and outlets

(Id., § A(2)(a)-(b)).

Section B of the PSE provides:

We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you:

1. Knew of any suspension or impairment in any protective safeguard listed in the schedule above and failed to notify us of that fact; or

2. Failed to maintain any protective safeguard in the Schedule above [i.e., the automatic sprinkler system], and over which you had control, in complete working order

(Id., § B(1)-(2)).

Section E of the Condominium Association Coverage form of the Illinois Union Policy provides an additional condition that the plaintiff insurers allege Grandview breached. Section E(3), captioned "Duties in the Event of Loss or Damage," subdivision (6), provides: "[a]s often as may be reasonably required, permit us to inspect the property ... [and] take samples of damaged and undamaged property for inspection and testing" (Id., § E(3)(a)(6), GA Underwriting 0000572).

According to the complaint, in the course of their investigation of the fire, plaintiffs discovered that the representations by Grandview as to the existence and extent of

protective safeguards were materially false and that, in fact, Grandview Palace was not covered by operable sprinklers and had a host of fire safety code violations, as discussed below. Plaintiffs denied coverage to Grandview on this basis.

As noted above, Illinois Union was also Grandview's primary property insurer for the May 21, 2010 to May 21, 2011 policy period, but was replaced by non-party Aspen American Insurance Company ("Aspen") as Grandview's primary property insurer the next year, until Aspen cancelled mid-term. Illinois Union's original quote for the 2010-2011 policy included the PSE. However, when pressed by Grandview's broker, Illinois Union agreed to waive the PSE (Farrell Affirm., Ex. B). Thus, the first 2010-2011 Illinois Union policy was issued with no PSE (Farrell Affirm., Ex. C). Illinois Union added the PSE to the 2011-2012 policy that replaced the Aspen policy, which also had no PSE (Farrell Affirm., Ex. D).

The Motions

Mtn Seq. No. 010

Illinois Union and Great American move for summary judgment seeking a judgment: (i) declaring that Grandview's claim for insurance coverage is barred based on the "Exclusions and Conditions" contained in the PSE; and (ii) dismissing Grandview's counterclaims. The counterclaims seek damages, including

litigation costs, based on an alleged breach of contract and bad faith, as well as a declaration of Grandview's rights under the policies.

Mtn Seq. No. 011

Grandview moves for partial summary judgment seeking dismissal of plaintiffs' claims that either arise out of the PSE, or are based on alleged misrepresentations by Grandview. Grandview argues that the PSE is illegal because it provides less coverage than the coverage mandated by the standard fire policy set forth in Insurance Law § 3404(e). Alternatively, Grandview argues that it was in compliance with the PSE; that there were no code violations under what Grandview contends were the applicable codes; and that, in any event, the insurers accepted premiums with knowledge that there were code violations and non-compliance with the PSE, raising defenses of waiver and estoppel. Grandview also argues that plaintiffs' motion should be denied because discovery has not been completed.

Discussion

Indisputably, by its plain language, the PSE required Grandview to maintain an Automatic Sprinkler System, including related supervisory services, in "ALL" buildings (Silverberg Affirm., Ex. 4, Endorsement, GA Underwriting 0000556). In addition, the PSE amended the Exclusions section of the policy to

bar coverage for loss by fire if Grandview either: (1) failed to maintain an Automatic Sprinkler System over which it had control "in complete working order;" or (2) knew the system was impaired but failed to notify the Insurers (Id., § B(1)-(2), GA Underwriting 0000557).

The record demonstrates that several of the interconnected buildings in Grandview Palace lacked any sprinkler system whatsoever at the time of loss (e.g., Silverberg Affirm., Ex. 11, pp. 45-46). In denying coverage, plaintiff insurers contend that the requirement to maintain a sprinkler system in "ALL" buildings obligated Grandview to install such a system in any building that may never have had one.

Even putting aside the requirement that a sprinkler system was required to be maintained in "ALL" buildings, loss by fire is also excluded from coverage if the Automatic Sprinkler System is not maintained in "complete working order" (Silverberg Affirm., Ex. 4, Endorsement). Plaintiffs argue that the sprinkler system that was present on the date of loss was not even close to being in "complete working order." Specifically, plaintiffs point to a number of sprinkler heads that were impaired by virtue of them being blocked by drop-ceilings, painted over, taped over or corroded (e.g., Gasser Aff., ¶¶ 20-21; Matarese Aff., ¶¶ 5-8). In addition, the system provided only partial coverage in many

buildings and part of the system that monitored the sprinklers operation was inoperable (Gasser Aff., ¶¶ 18-19; Isackson Aff., ¶ 8; Kaufman Aff., ¶ 19). Plaintiffs claim that, as a result, loss of fire is excluded because of the defects in the Automatic Sprinkler System.

In opposition and in support of its own partial summary judgment motion, Grandview argues that this Court should not consider the provisions of the PSE because it violates New York Insurance Law § 3404, which mandates that any property insurance policy covering the peril of fire must provide for at least as much coverage as the New York State standard fire policy, which is set forth in § 3404(e) (the "Standard Policy").

All fire insurance policies issued for property in the State of New York must, with exceptions not applicable here, "conform as to all provisions, stipulations, agreements, and conditions" with the Standard Policy (Insurance Law § 3404[b][1]). "The standard policy is the minimum level of coverage permissible for an insurance company to issue" (Lane v Security Mut. Ins. Co., 96 NY2d 1, 5 [2001]). An insurer may "offer policy terms more favorable to the insured than those contained in the standard policy," however, a policy that contains a term less favorable to the insured than the Standard Policy is only "enforceable as if it conformed with the statutory standard" (1303 Webster Avenue

Realty Corp. v Great Am. Surplus Lines Ins. Co., 63 NY2d 227, 231 [1984]). Thus, if any term in a fire insurance policy is less favorable to the insured than the Standard Policy would be, that policy is reformed to conform with the Standard Policy (G.E. Capital Mtge. Servs.v Daskal, 211 AD2d 613, 615 [2d Dept 1995]). By way of example, in 1303 Webster Avenue Realty Corp, supra, a fire policy requiring that suit be brought within one year was enforced as if it contained the two-year limitation contained in the Standard Policy because the one-year provision provided less coverage than that mandated by the Standard Policy (63 NY2d 227).

Grandview urges that insurance policies that violate the Standard Policy must be enforced as if the offending provision did not exist citing NY Insurance Law § 3404(f)(1)(A). In this instance, Grandview argues that because nothing in the Standard Policy requires an insured to have sprinklers, the policy requirement that Grandview maintain an automatic sprinkler system must be stricken from its policy. Grandview, however, proffers no legal support for its proposition and, indeed, independent research has not revealed any legal authority supporting such a conclusion on analogous facts.

The cases that are cited by Grandview are distinguishable in that they either: (1) do not address additional conditions contained in a PSE, or (2) contradict requirements explicitly

contained in the Standard Policy. For instance, Lane v Security Mut. Ins. Co. held that an insurer could not deny coverage to an innocent insured for fire intentionally set by her son, who was defined as "an insured" pursuant to the definition of insured contained in the subject policy (96 NY2d 1 [2001]). The Court of Appeals held that, "the subject exclusion impermissibly restrict[ed] the coverage mandated by statute and afforded the innocent insured" pursuant to Insurance Law § 3404 (Id. at 5). The Court explained that:

> Any policy that insures against the peril of fire must incorporate "terms and provisions no less favorable to the insured than those contained in the [standard fire policy] (Insurance Law 3404[f][1][A]). The standard policy exclusion provision entitled "Conditions suspending or restricting insurance," states that damages will be disclaimed "for loss occurring ... while the hazard is increased by any means within the control or knowledge of the insured" (emphasis added). The standard policy is the minimum level of coverage permissible for an insurance company to issue.

(Id.). The Court reasoned that by broadening the definition of "the insured" the policy at issue impermissibly provided for less coverage than the minimum permitted by the Standard Policy, which only allows damages to be disclaimed for losses occurring as a result of "the hazard [] increased by any means within the control or knowledge of the insured" (Id.; Ins. Law § 3404). Plainly, the hazard that results from a fire is increased by a property's lack of sprinklers and the failure to fix same is

within the control or knowledge of the insured. This fact is in stark contrast to Lane, where the insured was denied coverage for actions taken by "an insured" who was not within her control. As such, Lane does not support Grandview's interpretation of the Standard Policy.

Grandview also relies on Tag 380, LLC v Commet 380, Inc. (10 NY3d 507 [2008]). In that case, the Court of Appeals held that a policy violated Insurance Law § 3404 where it excluded coverage in the event that terrorism caused fire damage to a building (Id. at 514). Tag is also distinguishable from the instant case because here the policy does not exclude coverage for fire that results from a specifically named peril -- it simply requires that the insured maintain additional protection as a pre-condition to coverage. This requirement is no different from imposing a higher premium based on a higher likelihood of risk.

Contrary to Grandview's argument, by including the PSE, plaintiff insurers did not provide less than the mandated coverage under Insurance Law § 3404. Grandview's argument is based on the absence of language pertaining to sprinklers in the standard policy. It argues that because "[t]here is nothing in the '165 lines' [of the standard policy] which authorizes insurers to require such a warranty as a condition of coverage," it therefore follows that, "[t]he PSE clearly reduces coverage,

imposing on Grandview duties not found in the Standard Fire Policy: (1) to 'maintain' 'in complete working order' sprinklers throughout the Grandview complex; and (2) to notify Plaintiffs of any 'suspension or impairment' of those sprinklers" (Def. Memo. in Sup. of Partial Sum. Judg., p. 10). As noted, supra, Grandview cites no legal authority to support its novel contention. Were that argument accepted, however, an anomalous result for insureds would produced: without the ability to require that an insured mitigate certain high risk by installing, e.g., sprinklers, insurers would either charge substantially higher premiums of insureds like plaintiff who possess a substantially higher risk of fire due to their construction or decline coverage altogether. Although the result Grandview advocates may benefit itself in this instance, that position would produce a detrimental result for insureds as a whole, which would be at odds with what the Standard Fire Policy was enacted to accomplish. For all the foregoing reasons, Grandview's argument that the Standard Fire Policy precludes the plaintiff insurers from enforcing the PSE is without merit.

To prevail on their summary judgment motion, however, plaintiffs must show that Grandview indisputably breached the PSE, and that there are no triable issues of fact to preclude summary judgment. Plaintiffs have failed to do so. Plaintiffs

submit evidence in the form of lay and expert affidavits as well as deposition transcripts, in support of their contention that Grandview breached the PSE in that all of the insured buildings of the Grandview were not 100% covered by sprinklers, as allegedly warranted; that there were inoperable fire sprinklers, non-functioning fire alarms, fire and safety code violations, buildings without 100% sprinkler coverage, and buildings without any sprinklers; that there was no central fire monitoring station; and that there were fire safety code violations.

Grandview, in turn, submits the March 9, 2011 ACORD application, which states that a 16,048 square foot building to be insured is of frame construction and had zero percent sprinkler coverage (Breene 7/15/15 Affirm., Ex. E). This document raises an issue of fact as to whether Illinois Union tendered the policy with the knowledge that at least one of the buildings was not sprinklered. The ACORD application also conflicts with a spreadsheet of disputed authorship that shows that all buildings had 100% sprinkler coverage, raising further questions as to what information the insurers relied on in providing coverage (Id., Ex. D).

In addition, among other issues, as Grandview points out, there is conflicting evidence in the record as to which buildings in the complex were fully sprinklered at the time of the fire.

Plaintiff insurers include the S and J buildings in their description of "Grandview buildings" whereas those buildings were not insured under the policies, nor included in any insurance application. Neither building was connected to any of the others. Further, David Mallory, Grandview's head of security testified that at least three "I" buildings had no sprinklers in the individual units and only limited sprinklers in the common areas (Mallory EBT, 46-49, Silverberg Affirm., Ex. 11), and John McAuley, Grandview's Head of Maintenance, testified that there were sprinklers in the commons areas and the residential units in the I-A,B, and C, H, G, and M Buildings, as well as in the ramps connecting the E and F buildings and the I and G buildings (McAuley EBT, 70-78, 127, 130). Issues of fact also exist as to whether Illinois Union had knowledge of the defects in sprinkler coverage prior to the fire and/or should have inspected the property to ascertain its condition.

With respect to the excess policy with Great American, there is an additional factual issue as to whether that policy may be in effect irrespective of whether Grandview violated the PSE contained in the primary Illinois Union policy. As set forth, supra, the Great American policy was initially an excess policy to the Aspen policy, which contained no PSE requiring automatic sprinkler coverage. When the Aspen policy was replaced mid-term

by the Illinois Union policy, Great American simply issued a new endorsement without notifying Grandview of the change in the scope of coverage and without any reduction in premiums despite the reduction in the scope of coverage.

Based on the foregoing, summary judgment at this juncture in favor of either plaintiffs or defendant is not warranted.

Accordingly, it is

ORDERED that the plaintiffs' motion for summary judgment (mtn seq. no. 010) is denied, and it is further

ORDERED that defendant's motion for partial summary judgment (mtn seq. no. 011) is denied, and it is further

ORDERED that counsel shall appear in Part 48 for a status conference on January 12, 2017 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/9/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.