Bresnahan v New York Prop. Ins. Underwriting Assn.
2017 NY Slip Op 31324(U)
June 19, 2017
Supreme Court, New York County
Docket Number: 160575/2014
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

THOMAS BRESNAHAN and ANNE MCGOWAN,

Plaintiffs,

-against-

NEW YORK PROPERTY INSURANCE UNDERWRITING ASSOCIATION,

Defendant.

INDEX NO.	160575/2014
MOTION DATE	05/10/17
MOTION SEQ. NO.	001
MOTION CAL. NO.	

The following papers, numbered 1 to 9 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 6
Replying Affidavits	7 - 9

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's motion for summary judgment pursuant to CPLR §3212 is denied.

Plaintiffs Thomas Bresnahan and Anne McGowan (collectively herein the "Plaintiffs") commenced this action against Defendant New York Property Insurance Underwriting Association (herein "NY Property Insurance") for breach of contract pursuant to a New York Property Insurance Dwelling Policy (herein the "Policy"). Plaintiffs seek insurance coverage for damage to their primary residence at 25 Queens Walk, Queens, New York (herein the "Property") as a result of Hurricane Sandy on October 29, 2012. The Complaint alleges that Defendant failed to indemnify them adequately for damage to their Property caused by the Hurricane Sandy windstorm.

Defendant now moves for summary judgment to dismiss the Complaint pursuant to CPLR §3212 contending Plaintiffs' alleged Property damage was not caused by a peril covered under the Policy. Plaintiffs oppose the motion.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence,

in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]; Martin v Briggs, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Epstein v Scally, 99 AD2d 713, 472 NYS2d 318 [1984]). Summary Judgment is "issue finding" not "issue determination"(Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti v Musallam, 11 AD3d 280, 783 NYS2d 347 [1st Dept. 2004]).

New York courts hold that insurance contracts are interpreted to "give effect to the intention of the parties as expressed in the unequivocal language employed" (Breed v Ins. Co. of N.A., 46 NY2d 351, 413 NYS2d 352 [1978]). "As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning" (White v Cont'l Cas. Co., 9 NY3d 264, 848 NYS2d 603 [2007]). The interpretation of unambiguous provisions is a question of law for the court (id). Ambiguities are construed in favor of the insured and against the insurer, the drafter of the policy language (242-44 East 77th Street, LLC v Greater New York Mutual Ins. Co., 31 AD3d 100, 815 NYS2d 507 [1st Dept. 2006]). The court must look within the four corners of the document and not to extrinsic sources to determine whether a contractual term is ambiguous (Slattery Skanska Inc. v Am. Home Assur. Co., 67 AD3d 1 [1st Dept. 2009]). 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, 551 NE2d 92, 551 NYS2d 891 [1989]).

Defendant denied coverage by relying on the water exclusion endorsement and the anti-concurrent causation clause (Moving Papers Ex. 1). The anti-concurrent causation language states:

> We do not insure for loss caused directly or indirectly by any of the following [lists nine (9) 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 (id).
>
> "Water damage" is defined as, in its relevant parts:
>
> "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" (id).

An anti-concurrent causation provision applies only to multiple concurrent or sequential causes of the same loss or damage. This means when multiple forces lead to a single direct physical loss or damage to property (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 (Appleman, supra; Clarke v Travco Insurance Co, 2015 U.S. Dist. LEXIS 104267, 2015 WL 4739978 [USDC SDNY 2007]). The provision is not in play when separate and distinct losses are caused by separate and distinct perils or physical forces (Appleman, supra; Quanta Indemnity Co v Amberwood Development Inc, 2014 U.S. Dist. LEXIS 40211, 2014 WL 1246144 [USDC D Ariz 2014]).

New York courts have found that anti-concurrent causation provisions are unambiguous (Cali v Merrimack Mutual Fire Insurance Co, 43 AD3d 415, 841 NYS2d 128 [2nd Dept 2007]; Kula v State Farm Fire & Casualty Co, 212 AD2d 16, 628 NYS2d 988 [4th Dept. 1995]; Clarke v Travco Insurance Co, supra]. New York courts have excluded coverage as a result of this provision (Casey v General Accident Insurance Co, 178 AD2d 1001, 578 NYS2d 337 [4th Dept 1991]; Audrey's Management LLC v Admiral Insurance Co, 2009 WL 7015462 [Sup Ct. West Co 2009]; Clarke, supra). The Policy here is clear and unambiguous.

The parties here dispute the causation of damages to Plaintiffs' Property. Defendant contends that the loss was caused by water alone, which would be excluded. *Arguendo*, Defendant contends if wind did cause damage to the Property, the losses were caused in combination with the water damage, and therefore excluded by the anti-concurrent causation clause. Plaintiffs contend that wind, wind-driven rain, and wind-blown debris, all covered perils under the Policy, caused damage to the Property. Plaintiffs acknowledge damages to the Property caused by water but contend they are a separate, and loss caused by a separate physical force.

Defendant fails to make a prima facie showing of entitlement to summary judgment as a matter of law. The parties annexed expert affidavits and reports advance seperate theories as to how the Property was damaged and to what extent (Moving Papers Ex. 2,4, 5, 6, Opposition Papers Ex. 2). The experts sharply disagree as to whether wind alone, water, or wind combined with water contributed to the damages to Plaintiffs' Property. In evaluating the proof submitted by the parties, the court highlights 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 as well.

Under these circumstances, the experts' conflicting affidavits and reports raise material issues of fact on the question of causation which cannot be resolved in the context of a summary judgment motion (Hernandez v 21 Realty Co, 113 AD3d 503, 978 NYS2d 841 [1st Dept. 2014]; Bradley v Soundview Healthcenter, 4 AD3d 194, 772 NYS2d

56 [1st Dept. 2004]). Thus, Defendant's motion must be denied.

ACCORDINGLY it is ORDERED, that Defendant New York Property Insurance Underwriting Associate's motion for summary judgment to dismiss the Complaint pursuant to CPLR §3212 is denied, and it is further,

ORDERED, that the parties appear for a Compliance Conference on October 11, 2017 at 9:30 a.m. in IAS Part 13 at 71 Thomas Street, New York, NY 10013.

ENTER:

Dated: June 19, 2017

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE