At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 24th day of December 2018

PRESENT:
HON. CAROLYN E. WADE,
Justice

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TYRANA JONES, AVIANCA CARTER, IMANI JONES, RICHARD LUGO, TAREMA CARTER, SHANIA LUGO, SOMAE BUSCH, a minor by her parent and natural guardian IMANI JONES, ZURI PARNELL, minor by her parent and natural guardian TAREMA CARTER, WYNTAH HENEGAN, a minor by her parent and natural guardian TAREMA CARTER, and TYREEM CARTER, a minor by his parent and natural guardian TAREMA CARTER,

Plaintiffs,

-against-

STATE FARM FIRE & CASUALTY COMPANY, 174 MADISON, LLC, SHELL NY CONSTRUCTION, INC, BROOKLYN B COMPANY GROUP, INC., and JOHN/JANE DOES,

Defendants.

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KINGS COUNTY CLERK FILED 2019 JAN 11 AM 8:28

Index No.: 518268/2018

DECISION and ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiffs' Order to Show Cause:

Papers	Numbered
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1
Cross-Motion and Affidavits/Affirmations.....	
Answering Affidavits/Affirmations.....	2-4
Reply Affidavits/Affirmations.....	
Memorandum of Law.....	

Upon the foregoing cited papers, and after oral argument, plaintiff TYRANA JONES ("Ms. Jones"), ET. AL. (collectively "Plaintiffs") move by way of an Order to Show Cause for a Preliminary Injunction/Temporary Restraining Order against defendant STATE FARM FIRE & CASUALTY COMPANY, to ensure that they continue to pay Ms. Jones' hotel expenses.

The underlying action was commenced by Plaintiffs by way of an Amended Summons with Notice, sounding in breach of contract, injunctive relief, and a request for a declaratory judgment.

On October 26, 2018, a conference was held by this Court on the instant Order to Show Cause, which was signed by the Hon. Pamela L. Fisher, J.S.C. An interim order was executed which directed, *inter alia*, the following: 1) defendant STATE FARM FIRE & CASUALTY COMPANY ("State Farm") pay reasonable housing costs for the Plaintiffs "up to and including the decision on the motion;" and 2) Plaintiffs' and State Farm's counsel work in good faith to move Ms. Jones and her family into a reasonable housing accommodation, which included a kitchen. The application was then marked "submitted."

Most recently, a status conference was held on November 29, 2018. State Farm's counsel informed the court that Plaintiffs were relocated from a hotel to a less costly apartment. Moreover, counsel for defendants BROOKLYN B COMPANY GROUP, INC. ("Brooklyn B")

and SHELL NY CONSTRUCTION, INC. ("Shell") appeared for the first time. The court was informed that the service of Brooklyn B's Answer was forthcoming; and that Shell would be served the pleadings via the Secretary of State.

In support of the instant Order to Show Cause, Plaintiffs, by counsel, state that Tyrana Jones (Ms. Jones"), her two daughters, and four grandchildren, ages 2, 6, 8 and 11, have resided at their home located at 172 Madison Street, Brooklyn 11216 ("Subject Premises") for many years. Ms. Jones is named as an insured on a homeowners' policy issued by STATE FARM over ten years ago.

Plaintiffs allege that on June 20, 2018, their home was "nearly destroyed" by defendants 174 MADISON, LLC, SHELL NY CONSTRUCTION, INC., BROOKLYN B COMPANY GROUP, INC.'s construction in the lot adjacent to Ms. Jones' home. They assert that the contractors used an inexperienced driver to operate a large Hitachi backhoe, which stuck the Subject Premises, and caused significant damage. The Department of Buildings ("DOB") found Ms. Jones' home to be unsafe, and issued a Vacate Order on June 24, 2018, which required Plaintiffs to move out (Exhibit "1" of Plaintiffs' OSC). While State Farm paid for them to live in a hotel for the next two months, Plaintiffs received a letter, dated September 7, 2018, disclaiming coverage on that the ground that the property damage was caused by "Earth Movement." Plaintiffs contend that State Farm's engineer, Paul Angelides ("Mr. Angelides"), conducted an incomplete investigation of the property damage, as he neither entered the construction site nor inspected the external side of their home that was damaged by the Hitachi backhoe because the gate was locked. They further argue that the disclaimer is inapplicable to

the facts at bar because the property damage was caused by physical impacts and vibrations, not earth movement.

To buttress their contentions, Plaintiffs submit an affidavit from non-party witness, Rodriguez Manue[1] ("Mr. Manue"), who was at the Subject Premises on the day of the accident. Mr. Manue states that he heard the backhoe directly strike the building, and felt the entire home "violently shaking." Plaintiffs also submit the report of engineer Neil Wexler, Ph.D, P.E. ("Dr. Wexler"), the President of Wexler Associates Investigative Engineers. Dr. Wexler states that he reviewed photographs, videos and a written statement obtained from Mr. Manue, as well as a report prepared by State Farm's engineer, Adam C. Cassel, P.E. ("Mr. Cassel"), an employee of Paul Angelides, P.E.. P.C. He notes that some of the "photographs show wall marks consistent with hits by an excavator;" and that the Hitachi excavator lacked "reasonable workspace." He added that Mr. Cassel's report reflects that he only had access inside the building, not the construction site. Thus, Plaintiffs maintain that State Farm's engineer was unable to view the external hit marks that caused damage to the building.

In opposition, State Farm argues that Plaintiffs have failed to demonstrate by clear and convincing evidence that they have satisfied the elements to obtain a temporary restraining order/preliminary injunction. It notes that after Ms. Jones submitted her claim for property damage on June 24, 2018, State Farm agreed to pay for her hotel expenses. In a letter to Ms. Jones dated June 29, 2018, State Farm notified her that there was a question of coverage, and reserved its rights under the policy while it investigated the claim (Exhibit "2" of State Farm's opposition).

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[1] The court notes that Dr. Wexler's report refers to Mr. Manue as Manuel Rodriguez.

State Farm annexes an affidavit from Adam C. Cassel, P.E., who states that he inspected the Subject Premises on July 2, 2018 to determine the cause of the property damage. Cassel states that Dr. Wexler's September 10, 2018 report contains photographs of minor scrapes or scratches on the surface of the wall, but avers that those damages would not cause structural damage to the building. Moreover, Cassel "determined within a reasonable degree of engineering certainty that the excavation and earthwork on 174 Madison Street caused soil movement which undermined the left side of Property." The engineer further opined that the Hitachi excavator could not vibrate at a level and intensity to cause the damage he observed to the Subject Premises. He also found it unnecessary for him "to access the construction site to determine the cause of loss or to rule out vibrations or a strike by the Hitachi."

Plaintiffs, in rebuttal, assert that they have demonstrated that the Hitachi backhoe's physical impact is the most likely cause of the property damage, which is a covered loss under the policy. They maintain that State Farm has not met its burden of proving that the property damage was caused by earth movement; and stress that Ms. Jones and her grandchildren would be irreparably harmed if their application is not granted.

To prevail on a preliminary injunction application, a movant must "demonstrate a likelihood or probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in his favor (*see* CPLR § 6301; *see generally Doe* [*v Axelrod*], 73 NY2d [748,] at 750 [1988])" *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Lombard v Station Sq. Inn Apts. Corp.*, 94 AD3d 717, 718 [2012]); *306 Rutledge, LLC v City of New York*, 90 AD3d 1026, 1028 [2011]; *Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 624 [2011]).

Courts hold that "[e]xclusions from coverage in an insurance policy are to be accorded a strict and narrow construction [citations omitted]. Accordingly, an insurer seeking to rely on a policy exclusion bears the burden of establishing "that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case. 'The burden is a heavy one, and if the language is doubtful or uncertain in its meaning, any ambiguity will be construed in favor of the insured and against the insurer" (*Vertex Restoration Corp. v. Catlin Ins. Co.*, 156 AD3d 847 [2d Dept 2017]; see also Boro *Park Land Co., LLC v. Princeton Excess Surplus Lines Ins. Co.*, 140 AD3d 909 [2d Dept 2016]) [citing *Lee v. State Farm Fire & Cas. Co.*, 32 AD3d 902 [2d Dept 2006]]).

In the instant case, Plaintiffs have demonstrated that Ms. Jones, and her young grandchildren: ages 2, 6, 8, and 11, *inter alia*, will be irreparably harmed if they are not provided temporary housing, particularly as the holiday and winter months approach. A Full Vacate Order issued by the DOB on June 24, 2018 mandated that they leave their home, as it was rendered "non-compliant due to excavation" (Exhibit "1" of Plaintiffs' OSC).

To establish a likelihood of success on the merits, Plaintiffs aptly note that State Farm's engineers did not conduct a complete inspection, as Cassel acknowledged that he and Angelides did not see the construction site, as the fence was locked. Due to the obstruction, it appears that they did not inspect the side of the building's exterior, which was allegedly struck by the Hitachi backhoe.

This Court also finds that the balance of the equities favors the Plaintiffs' position. State Farm relies on the "Earth Movement" exclusion in the insurance policy to argue that they are not entitled to coverage, and payment of their living expenses. State Farm points out that the

policy's definition of "Earth Movement" is "the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not. Earth movement includes but is not limited to earthquake, landslide, mudflow, mudslide, sinkhole, subsidence, erosion or movement resulting from improper compaction, site selection or any other external forces [...]." However, it is imperative to note that Cassel, State Farm's engineer, determined within a reasonable degree of engineering certainty, that the **excavation** and earthwork at 174 Madison Street caused soil movement which undermined the left side of the subject property.

Significantly, the Second Department has examined State Farm insurance policies which contained "Earth Movement" exclusions that are virtually identical to the one at bar; and found that excavation is excluded from that basis for disclaiming coverage (*Lee v. State Farm Fire & Cas. Co.*, 32 AD3d 902 [2d Dept. 2006]; *Pioneer Tower Owners Assn. v. State Farm Fire & Cas. Co*, 12 NY2d 302 [2d Dept 2009]). The court further notes that there is an obvious conflict between the parties' experts as to the cause and extent of the damage to Plaintiffs' premises.

Lastly, the subject State Farm insurance policy addresses coverage for an insured's loss of property use:

> **COVERAGE C- LOSS OF USE**
>
> **Additional Living Expense**. When a Loss Insured causes the **residence premises** to become uninhabitable, we will cover the necessary increase in cost you incur to maintain your standard of living for up to 24 months. Our payment is limited to incurred costs for the shortest of (a) the time required to repair or replace the premises; (b) the time required for your household to settle

elsewhere; or (c) 24 months. This coverage is not reduced by the expiration of this policy.

Since defendant State Farm has not satisfied its burden of establishing that the subject accident squarely falls within its "Earth Movement" exemption, this Court determines that Plaintiffs, at this juncture, are entitled to continued coverage for their loss of property use.

Accordingly, based upon the above, Plaintiffs' Order to Show Cause for a Preliminary Injunction is hereby **GRANTED**.

ORDERED that defendant State Farm continues to pay for Plaintiffs' temporary housing costs until the resolution of this matter, or further Order of this Court; and it is

ORDERED that Plaintiffs post a bond for $50,000 on or before January 20, 2019.

This constitutes the Decision/Order of the court.

2019 JAN 11 AM 9:28

ENTER

HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

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ACTING SUPREME COURT JUSTICE