No. 63

Pioneer Tower Owners Association,
Respondent,
v.
State Farm Fire & Casualty Company et al.,
Appellants.

Stuart M. Bodoff, for appellants.
Lawrence A. Kushnick, for respondent.
New York Insurance Association, Inc. et al., amici curiae.

SMITH, J.:

Plaintiff seeks recovery under an insurance policy for damage to its building that resulted from an excavation on an adjacent lot. We hold that policy exclusions for "earth movement" and "settling [or] cracking" did not unambiguously remove this event from the policy's coverage.

I

Plaintiff is the owner of a condominium apartment building. After cracks began appearing in the building, a structural engineer was called in. He found a number of cracks, separations and open joints, and concluded that they were caused by work that was in progress on the lot next door. That lot was being excavated, and underpinning had been built to protect the foundation of plaintiff's building. The engineer concluded, and it is undisputed in this case, that the underpinning was flawed, and that as a result earth slid away beneath plaintiff's building, causing damage.

Plaintiff submitted a claim for the damage to defendant State Farm Fire & Casualty Company (defendant), which had insured the building against "accidental direct physical loss." Defendant disclaimed coverage, relying on the "earth movement" exclusion in its policy, which says:

> "We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss.
>
> ...
>
> "b. earth movement, meaning 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, erosion, and subsidence but does not include sinkhole

collapse.

> "But if accidental direct physical loss by fire, explosion other than explosion of a volcano, theft or building glass breakage results, we will pay for that resulting loss."

Plaintiff brought this action to recover for its loss. In litigation, defendant and amici supporting it rely not only on the earth movement exclusion but on several others, of which we think only one requires discussion. That exclusion, the settling or cracking exclusion, says:

> "We do not insure for loss either consisting of, or directly and immediately caused by, one or more of the following:
>
> ....
>
> "f. settling, cracking, shrinking, bulging or expansion.
>
> "But if accidental direct physical loss by any of the 'Specified Causes of Loss' or by building glass breakage results, we will pay for that resulting loss."

None of the "Specified Causes of Loss" -- a 14 item list, including fire, windstorm and water damage among other things -- is present in this case.

On cross motions for summary judgment, Supreme Court ruled in plaintiff's favor on the issue of liability. After a stipulation as to the amount of damages, Supreme Court entered judgment for plaintiff. The Appellate Division modified the judgment to add a declaration in plaintiff's favor, and otherwise

affirmed. We granted leave to appeal, and now affirm.

II

The law governing the interpretation of exclusionary clauses in insurance policies is highly favorable to insureds. We said in Seaboard Sur. Co. v Gillette Co. (64 NY2d 304 [1984]):

> "[W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction. Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation."

(Id. at 311 [citations and internal quotation marks omitted; see also Cone v Nationwide Mut. Fire Ins. Co., 75 NY2d 747, 749 [1989] [exclusions from coverage "construed strictly against the insurer"]; Breed v Insurance Co. of N. Am., 46 NY2d 351, 353 [1978] ["ambiguities in an insurance policy are to be construed against the insurer, particularly when found in an exclusionary clause"].) We have enforced policy exclusions only where we found them to "have a definite and precise meaning, unattended by danger of misconception ... and concerning which there is no reasonable basis for a difference of opinion" (Breed, 46 NY2d at 355).

This case is a close one, but we cannot say that the

event that caused plaintiff's loss was unambiguously excluded from the coverage of this policy.

Defendant's argument is, in substance, that the literal language of the exclusions describes what happened here. The earth movement exclusion applies, defendant says, because the loss was caused by the movement of earth, and specifically by its "sinking" and "shifting" beneath plaintiff's building. And the settling or cracking exclusion applies, in defendant's view, because the loss consisted of cracking that was directly and immediately caused by the settling of the building (which was in turn caused by the excavation). Indeed, plaintiff's own engineer's report says "that the left wing of the building ... had settled ... as evidenced by the cracking and lateral displacement of the structure."

Plaintiff argues, however, that a literal reading of the words does not give the meaning that an ordinary reader would assign to these exclusionary clauses. As to the earth movement exclusion, plaintiff stresses the examples of earth movement given in the policy -- "earthquake, landslide, erosion and subsidence." Plaintiff argues that an excavation -- the intentional removal of earth by humans -- is a different kind of event from an earthquake and the other examples given; plaintiff suggests that, when specific examples are mentioned, those not mentioned should be understood to be things of the same kind. Indeed, if the drafter of the policy intended to bring excavation

-- an obvious and common way of moving earth -- within the exclusion, why was it not listed as an example while less common events were listed?

Similarly, plaintiff argues that the settling or cracking exclusion would not be thought, by an ordinary reader, to apply to settling or cracking that is the immediate and obvious result of some other event, such as the intentional removal of earth in the vicinity of the building. Read literally, the exclusion would apply, for example, where a refrigerator fell over and cracked a wall, but that can hardly have been the intent of the policy's drafters.

We conclude that both plaintiff's and defendant's readings of the clauses are reasonable. Our precedents require us to adopt the readings that narrow the exclusions, and result in coverage. As to the earth movement exclusion, our holding is also supported by precedent which, though not binding on us, is directly on point. Two Appellate Division cases and one federal district court decision have held that earth movement exclusions using identical language are not applicable to losses caused by excavation (Lee v State Farm Fire & Cas. Co., 32 AD3d 902 [2d Dept 2006]; Burack v Tower Ins. Co. of N.Y., 12 AD3d 167 [1st Dept 2004]; Wyatt v Northwestern Mut. Ins. Co. of Seattle, 304 F Supp 781 [D Minn 1969]). The parties have cited no case, and we have found none, applying the earth movement exclusion to intentional earth removal.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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Order affirmed, with costs. Opinion by Judge Smith. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

Decided April 30, 2009