Barchester Realty Corp. v New Hampshire Ins. Co.
2010 NY Slip Op 33991(U)
December 13, 2010
Supreme Court, Kings County
Docket Number: 2066/04
Judge: Jack M. Battaglia
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 59

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BARCHESTER REALTY CORP.,

Plaintiff,

-against-

NEW HAMPSHIRE INSURANCE CO. and AIG INSURANCE SERVICES, INC.,

Defendants.

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Index No. 2066/04
Motion Calendar No. 12
October 25, 2010

DECISION AND ORDER
Jack M. Battaglia
Justice, Supreme Court

Recitation in accordance with CPLR 2219 (a) of the papers considered on defendants New Hampshire Insurance Co.'s and AIG Insurance Services, Inc.'s motion for an order, pursuant to CPLR 3212, granting them summary judgment dismissal of Plaintiff's Verified Complaint against them; and for an order, pursuant to CPLR 3001, declaring that defendant New Hampshire "is not obligated to pay Barchester Realty Company under its policy number, MLP151-31-95 for any loss or damage from a pipe freeze-up that occurred on January 23, 2003":

- Notice of Motion
  Affirmation in Support
- Memorandum of Law in Support of Defendants' Motion for Summary Judgment
- Exhibits A-L
- Affirmation in Opposition
  Exhibits A-G
- Affidavit in Opposition
  Exhibit A
- Affidavit
- Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment
- Reply Affirmation

According to the Verified Complaint, on February 12, 2001, defendant AIG Insurance Services, Inc. ("AIG") and its wholly-owned subsidiary, defendant New Hampshire Insurance Co. ("New Hampshire"), issued a Special Multi Peril Policy MLP 1513195 to plaintiff Barchester Realty Corp. ("Barchester"). The policy insured Plaintiff's property located at 425 Keap Street, also known as 439 Grand Street, Brooklyn, from February 12, 2001 through February 12, 2004. On or about January 23, 2003, the property allegedly sustained damage as a result of frozen water pipes bursting. On January 31, 2003, Plaintiff allegedly notified and submitted a claim to Defendants under the insurance policy. On September 24, 2003, Defendants notified Plaintiff that the insurance claim was denied. Thereafter, Plaintiff commenced the instant action alleging breach of contract and bad faith.

Initially, to the extent that Defendants seek a declaration pursuant to CPLR 3001, their motion must be denied because there are no pleadings in this action seeking a declaratory judgment. Indeed, CPLR 3001 is contained in Article 30 entitled "Remedies and Pleadings".

In their motion, Defendants contend that they are entitled to summary dismissal of Plaintiff's Verified Complaint based upon the "Vacancy and Unoccupancy Exclusions", so characterized by Defendants (Memorandum of Law in Support of Defendants' Motion for Summary Judgment, Point 1), which provide:

"17. Vacancy, Unoccupancy and Increase of Hazard

(a) This Company shall not be liable for loss occurring while a described building, whether intended for occupancy by owner or tenant is vacant beyond a period of sixty consecutive days. "Vacant" or "Vacancy" means containing no contents pertaining to operations or activities customary to occupancy of the building, but a building in process of construction shall not be deemed vacant.

(b) Permission is granted for unoccupancy.

(c) Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring while the hazard is increased by any means within the control or knowledge of the insured."

Defendants contend that this exclusion applies because the premises were "vacant" for more than sixty days, and because three years of construction operations at the insured premises "increased the hazard" since no tenants resided in the building.

In support, Defendants point to Endorsement #1A, which granted Plaintiff permission for the building to be "Vacant and/or under renovation for a period of THREE MONTHS (2/12/01-5/12/01)", and that at the end of the three month period, "the policy will revert back to Agreed Amount." It is undisputed that the Endorsement #1A was not in effect on January 23, 2003.

Defendants also submit the deposition testimony of Frank Mazzocchi that he is the president of Barchester Realty Corp.; that he was also the president of Max Smith Construction, who performed the construction work at the subject premises; that the premises was a six-story building; that as of May 2002, the construction was "supposed" to have been completed; that between May 2002 and October 2002, minor construction work was still being performed at the premises; that the construction of the building was completed prior to the time the City inspected the building on November 22, 2002; that "maid's work" commenced prior to November 22, 2002 and lasted until January 10, 2003; that the "maid's work" included the cleaning of floors, windows, and fixtures, as well as polishing chrome; that employees of Max Smith Construction

performed the "maid's work" five days a week; that after January 10, 2003, he would visit the site every day to check boilers and to see if anything was stolen; that the building had two boilers in the basement; that there was an "emergency" or "master" switch located in the basement inside the entrance door to the boiler, meant to shut down electricity to the boilers in case of a fire; that there was no security guard at the premises; that on January 17, 2003, he went on vacation to Florida and was planning to return on February 1, 2003; that prior to leaving, he called Ray Lam, but was unable to reach him, and so he left Ray Lam a voice message asking him to check the property while he was away; that Ray Lam did not receive the message until about January 23, 2003 because he was in New England; that on January 23, 2003, Ray Lam called and informed him about the water damage to the building; that he left Florida "immediately"; and that nobody checked the building at any time from January 17, 2003 to January 23, 2003.

"The law governing the interpretation of exclusionary clauses in insurance policies is highly favorable to insureds." (*Pioneer Tower Owners Association v State Farm Fire & Casualty Company*, 12 NY3d 302, 306-07 [2009].) "[W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language." (*Seaboard Sur. Co. v Gillette Co.*, 64 NY3d 304, 311 [1984] [citations and internal quotation marks omitted].) "Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced." (*Id.*.) "They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction." (*Id.*) "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.*)

Here, in order for the exclusion to apply, Defendants bear the burden of demonstrating that the premises were "vacant" as that term is defined in the contract. According to the provision, " 'Vacant' or 'Vacancy' means containing no contents pertaining to operations or activities customary to occupancy of the building, but a building in process of construction shall not be deemed vacant." The term "unoccupancy" is not defined in the contract, but it has been held that "the regular presence of inhabitants" makes "occupancy." (*See McCabe v Allstate Ins. Co.*, 260 AD2d 850, 851 [3d Dept 1999]; *Couto v Exchange Ins. Co.*, 174 AD2d 241, 244 [3d Dept 1992].) Here, the policy provision itself "grants permission" for unoccupancy.

While the provision defines "vacancy" as "containing no contents pertaining to operations or activities customary to occupancy of the building", it expressly permits "unoccupancy". Since the provision itself allows unoccupancy, the fact that the building is unoccupied cannot in and of itself establish that the building is "vacant", *i.e.*, does not contain "contents pertaining to operations or activities customary to occupancy." Indeed, the policy is not clear as to what items would qualify as "contents pertaining to operations or activities customary to occupancy", and Defendants fail to point to any evidence as to the parties' understanding of the phrase, or to any authority clarifying the meaning of the phrase. As such, Defendants fail to make any demonstration that the subject building, which was admittedly unoccupied, did not have contents

pertaining to operations or activities customary to occupancy.

In any event, even assuming that the fact of unoccupancy is sufficient to establish that the building did not have "contents pertaining to operations or activities customary to occupancy", Defendants fail to establish that the building was not "in process of construction", and, therefore, "not deemed vacant". In this regard, Defendants acknowledge Mr. Mazzocchi's testimony that there was "maid's work" being performed in the building until January 10, 2003. If the building was "not deemed vacant" until after January 10, 2003, then it had not been vacant "beyond a period of sixty consecutive days" on the day of the loss. However, Defendants contend "maid's work" does not constitute "construction."

Mr. Mazzocchi testified that the "maid's work" was performed by employees of his construction company, Max Smith Construction, and that the work included removal of construction debris, and cleaning or polishing of floors, windows, and fixtures. He also testified that this "maid's work" commenced in November 2002, and that workers were on premises five days a week until January 10. Defendants provide no evidence that this work, which was performed by the same construction company that constructed the building, which commenced immediately after the physical construction phase, and which took over a month to perform, was not part of the construction process as contemplated by the policy. The policy itself does not define "construction", and therefore does not restrict the activities that are included as part of the "process of construction." Resolving the uncertainty in favor of the insured, Defendants have failed to meet their *prima facie* burden demonstrating that the building was not "in process of construction" during the "maid's work." As such, Defendants fail to establish *prima facie* that the building was vacant beyond a 60-day period.

The cases cited by Defendants, *Korn v New York Property Ins. Underwriting Assoc.* (59 AD2d 525 [2d Dept 1977]) and *Masterpol, Inc. v Travelers Ins. Co.* (273 AD2d 817 [4th Dept 2000]), are inapposite since in both of those cases there was no question that the building was "vacant"as that term was defined in those policies. Similarly, in *Gallo v Travelers Property Casualty* (21 AD3d 1379, 1380 [4th Dept 2005]), "pursuant to the terms of the insurance policy at issue, a building [was deemed to be] vacant if it 'does not contain enough business personal property to conduct customary operations.' " In that case, the building was deemed vacant under such policy.

Defendants fail to show that the expiration of Endorsement #1A has any relation to the application of the "Vacancy and Unoccupancy Exclusions". The meaning of Endorsement #1A, which permits the building to be "Vacant and/or under renovation for a period of THREE MONTHS (2/12/01-5/12/01)" at best creates confusion in light of the "Vacancy and Unoccupancy Exclusions' " language that the building "in process of construction shall not be deemed vacant." Defendants fail to make any evidentiary showing as to the understanding of the parties on the relationship between Endorsement #1A and the "Vacancy and Unoccupancy Exclusions", such that Plaintiff should be denied coverage due to the fact that Endorsement #1A had expired.

Defendants next contend coverage must be denied because of the "increase of hazard" portion of the "Vacancy and Unoccupancy Exclusions", which provides that "[u]nless otherwise provided in writing added hereto this Company shall not be liable for loss occurring while the hazard is increased by any means within the control or knowledge of the insured." Defendants contend that the "insured premises constituted an increased hazard because the property was never put to its intended use as a residential building", that it was under construction, and because Plaintiff failed to extend the applicable period of Endorsement #1A.

Most significantly, Defendants fail to make any showing how any construction activity would increase the hazard of freeze-up water damage in the building. Indeed, the exclusion expressly permits "unoccupancy", and expressly states that a building "in process of construction" shall not be deemed vacant. Read in their entirety, a fair interpretation of the "Vacancy and Unoccupancy Exclusions" suggests that construction activity in itself was not contemplated to be an "increase of hazard".

Moreover, Defendants' contention that Plaintiff's allowing Endorsement #1A to expire and failing to extend same "increased the hazard" is without merit in light of Defendants' failure to make any showing, as stated above, to reconcile the "Vacancy and Unoccupancy Exclusions" and Endorsement #1A.

The case of *Majtan v Madision Mutual Ins. Co.* (249 AD2d 867 [3d Dept 1998]), also relied upon by Defendants, is inapposite. In that case, the plaintiff/insured purchased insurance for a fully-occupied three-unit apartment, but "by November 1993, all of the tenants had moved out of the building", the plaintiff turned off all the utilities, removed the meters, turned off the water, and had rented the building for nominal rent to a "homeless" man "notwithstanding the absence of heat, electricity or water in the building." (*See id. at 867.*) Thereafter, an unknown individual set fire to the building. (*See id.*)

The Third Department held that "[a]n increase of the hazard insured against 'takes place when a new use is made of the property, or when its physical condition is changed from that which existed when the policy was written and the new use or changed condition increases the risk assumed by the company." (*See id.*) The Third Department determined that the proof in that case was sufficient to establish as a matter of law that the plaintiff knowingly increased the risk of a fire hazard, but noted that "generally the question of whether a hazard was increased by means within the control of the insured is an issue of fact." (*See id.* at 868-69.)

Here, the building never changed from residential use to being in the process of construction, or vice versa. Unlike the insurer in *Majtan*, Defendants did not issue a policy for a fully-occupied residential building. Indeed, it is undisputed that Defendants issued the policy to Plaintiff when the building was under construction. Again, Defendants make no showing, in any event, that construction activity increases the risk of freeze-up water damage.

Accordingly, the branch of Defendants' motion seeking summary judgment dismissal based upon the "Vacancy and Unoccupancy Exclusions" is denied.

Defendants next contend that it is entitled to summary judgment dismissal of Plaintiff's Verified Complaint on the ground that the following exclusion applies to deny coverage:

"VII. EXCLUSIONS

This policy does not insure under this form against loss caused by:

* * *

D. Leakage or overflow from plumbing, heating, air conditioning or other equipment or appliances (except fire protective systems) caused by or resulting from freezing while the building is vacant or unoccupied, unless the insured shall have exercised due diligence with respect to maintaining heat in the buildings or unless such equipment and appliances had been drained and the water supply shut off during such vacancy or unoccupancy."

Defendants contend that Plaintiff failed to exercise "due diligence" with respect to maintaining heat in the building when Mr. Mazzocchi left for vacation on January 17, 2003, and left Ray Lam a voice message to check the building, but never actually spoke to Ray Lam. In addition to proffering Mr. Mazzocchi's aforementioned testimony, Defendants also submit the unsigned and unsworn deposition transcript of non-party Ray Lam, which was not shown to have been submitted to Mr. Lam pursuant to CPLR 3116. As such, the transcript is not admissible as evidence on this motion. (*See Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 902 [2d Dept 2008].)

Given that the burden of demonstrating the applicability of the exclusion rests on Defendants, and giving the plaintiff/insured the benefit of every favorable inference as the opponent of a summary judgment motion, the Court cannot say that Plaintiff did not exercise "due diligence" as a matter of law by only leaving a single voice message with Ray Lam to check the building while he was away. Such a determination can only be made after consideration of all of the facts and circumstances, including whether Mr. Mazzocchi could reasonably expect Mr. Lam to have complied with his request to check the building on the voice message based upon, among other things, their custom, practice, and procedure in communicating with one another for such matters. Defendants point to no other evidence demonstrating that the heat was not otherwise maintained up until the time of the incident. As such, Defendants fail to demonstrate *prima facie* that Plaintiff failed to exercise "due diligence" in maintaining the heat.

Moreover, Defendants fail to submit any admissible evidence as to how the freeze-up of the pipes occurred. Mr. Mazzocchi testified that there was an emergency switch in the basement,

capable of turning off the electricity to the boilers, but he does not testify that he ever observed that the switch was turned off, nor do Defendants point to any other admissible testimony establishing *prima facie* that the switch was turned off. As such, they fail to establish that lack of due diligence in maintaining the heat caused the freeze-up. In any event, even if the Court were to consider Mr. Lam's testimony that the emergency switch had been turned off, this alone does not establish that the switch was turned off due to any lack of due diligence in maintaining the heat by Plaintiff.

The branch of Defendants' motion seeking summary judgment dismissal of Plaintiff's claim for "punitive damages as a result of alleged bad faith claims handling" is granted without opposition. (*See generally New York University v Continental Ins. Co.*, 87 NY2d 308, 319-20 [1995]; *Rocanova v Equitable Life Assur. Socy.*, 83 NY2d 603, 616-17 [1994].) However, Defendants fail to make any *prima facie* showing that should Plaintiff prevail on its breach of contract cause of action, Plaintiff would not be entitled to consequential damages. (*See Bi-Economy Market, Inc. v Harleysville Ins. Co. of New York*, 10 NY3d 187, 196 [2008].)

In sum, Defendants' motion for an order, pursuant to CPLR 3212, for summary judgment dismissal of Plaintiff's Verified Complaint is granted only with respect to Plaintiff's claim for punitive damages, and is denied in all other respects. Defendants' motion for an order, pursuant to CPLR 3001, seeking a declaration that New Hampshire is not obligated to pay Barchester Realty Company under its policy number MLP151-31-95 for any loss or damage from a pipe freeze-up that occurred on January 23, 2003 is denied.

December 13, 2010

Jack M. Battaglia
Justice, Supreme Court