SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 10
Justice

BODINE, BRADFORD

- v -

AMERICAN INTERNATIONAL INSURANCE COMPANY (n/k/a 21st CENTURY NORTH AMERICAN INSURANCE COMPANY)

INDEX NO. 111154-2010

MOTION DATE

MOTION SEQ. NO. 006

The following papers, numbered 1 to 7, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits ---------- No(s). 1, 2

Notice of Cross-Motion — Affirmation — Affidavit(s) — Exhibits ---------- No(s). 3

Answering Affirmation(s) — Affidavit(s) — Exhibits ---------- No(s). 4, 5

Replying Affirmation — Affidavit(s) — Exhibits ---------- No(s). 6,7

Upon the foregoing papers, it is ordered that the motion is

In this action to recover insurance coverage for damages sustained to Plaintiff's premises, Defendant American International Insurance Company ("Defendant") moves for an Order pursuant to CPLR §3212, dismissing Plaintiff Bradford Bodine's ("Plaintiff") claims. Plaintiff opposes Defendant's motion and cross-moves for summary judgment pursuant to CPLR §3212. Defendant opposes Plaintiff's cross-motion.

On September 3, 2009, a retaining wall collapsed at Plaintiff's home (located at 75 Huntington Avenue in Scarsdale, New York) causing damage to Plaintiff's property. Plaintiff placed a claim under her insurance policy and Defendant denied coverage after inspection, where it stated the damage falls under multiple exclusions to Plaintiff's insurance policy. Plaintiff brings suit in New York County to recover for the loss sustained, in excess of $297,938.00.

In support of its motion, Defendant argues Plaintiff's claim is not covered under its policy, where the claim for the collapsed retaining wall and the underlying cause for the collapse falls under multiple exclusions to the policy. Defendant's policy provides full coverage unless an exclusion applies. Defendant retained expert engineer Michael Walsh ("Walsh") immediately after Plaintiff filed her claim, who visited the premises and found significant washout which caused instability and ultimately collapse, along with long-term wear and tear which occurred when features not included in the original construction did not allow for proper draining. Further, Walsh found a gap between the chimney and the exterior siding created by movement/shrinkage in the siding. Plaintiff's neighbors, the Lotens, hired Thomas Parisi ("Parisi") through its own insurance carrier to investigate the collapsed wall, which fell on the Lotens' garage. Parisi opined that the cause of the collapse was the inadequately designed wall built in 1922, improper surface drainage which caused erosion and pressure buildup, inadequate draining behind the wall, and inadequate height foundation for the new addition built on Plaintiff's home. Lastly, Plaintiff's own engineer, Kevin Archer "(Archer") opined that the collapse was linked with the addition

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

that was built on the residence where he found multiple instances of overstress from the addition and where he further stated that proper construction of the addition would have required the rebuilding of the retaining wall. Based upon the various expert reports and inspections of the premises, Defendant denied coverage to Plaintiff, where the following exclusions applied to the claim:

1) "Gradual/sudden Loss" where the collapse was due to gradual deterioration;
2) "Surface/groundwater damage" where the collapse was due to excessive hydrostatic pressure build up behind the wall which was caused by improper surface drainage and from the diverted water towards the wall causing erosion; and
3) "Faulty/inadequate/ defective planning" where the original design of the wall allowed for soil to washout at the base of the wall and a lack of gravel behind the wall and tie-backs to keep the wall in place contributed to the failure and eventual collapse.

As such, where the above-referenced exclusions preclude Plaintiff from coverage, Defendant is entitled to summary judgment and Plaintiff's claim should be dismissed.

In opposition, Plaintiff argues that the loss falls within the policy and as such, Defendant must indemnify Plaintiff for its loss. The Policy covers all fortuitous losses not resulting from misconduct or fraud. The burden is on the insured to demonstrate that the claim was fortuitous. Under New York law, courts are not to consider remote "causes of causes." The attempts by Defendant to distract the court with references to events occurring over 100 years ago is unfounded. Further, Plaintiff's argue that Defendants motion is without merit, where it ignores the fact that the proximate cause of the fortuitous loss was the collapse. Defendant affirmatively chose not to include collapse as an exclusion to its policy, where other insurance companies list collapse as an exclusion. Even if the Court chooses to consider the various exclusions, there are issues of fact presented by Archer's Affidavit, which require a denial of Defendants motion for summary judgment. Archer finds that there is no evidence of wear and tear, surface and/or ground water cannot have caused the walls failure, and such defects presented by Walsh and Parisi that relate to the faulty/inadequate building of the wall would have manifested much earlier than the date of the collapse. Each of the exclusions relied upon by Defendant include a provision stating that exclusions don't apply to an "ensuing loss from a peril not otherwise excluded by the Policy." Plaintiff argues that coverage must be provided where there is a compensable intervening occurrence taking place between the alleged exclusionary cause of loss and the occurrence giving rise to the insured's claim.

"A party moving for summary judgement must make a *prima facie* showing of entitlement to a judgement as a matter of law, providing sufficient evidence to demonstrate the absence of any material issue of fact." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81, 760 NYS2d 397, 790 NE2d 772 [2003]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Id.*) Additionally, "[W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language...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." *(Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 486 N.Y.S.2d 873, 476 N.E.2d 272 [1984]).

Defendant made its prima facie case with admissible evidence that Plaintiff's loss was excluded from insurance coverage. With affidavits from its own expert, Michael Walsh, along with the neighbor's independent expert Thomas Parisi and Plaintiff's expert Kevin Archer, Defendant proves that multiple exclusions apply to Plaintiff's claim. Under the "Gradual or Sudden Loss" exclusion, the language specifically cites to wear and tear and gradual deterioration, both of which are found by all three experts in this case. Under the "Surface and Ground Water Damage," Defendant specifically states it does not cover losses caused by surface water, water below the surface of the ground which exerts pressure on sidewalk, driveway, foundation, or other structure. Lastly, the "Faulty, inadequate, defective planning"

exclusion language cites to development, design, specifications, workmanship, construction, renovation, remodeling, etc. Each of these exclusions, which contain clear and unmistakable language, was found by the expert engineers during their inspections of the property.

More specifically, under the "Faulty, Inadequate, or Defective Planning" exclusion, the First Department, Appellate Division holds, "The only reasonable explanation of the negligent work exclusion is that it applies to negligent work by or on behalf of the insured in planning, designing or constructing the insured building, which results in damage to the building." (*242-44 E. 77th St., LLC v. Greater New York Mut. Ins. Co.*, 31 A.D.3d 100, 106, 815 N.Y.S.2d 507, 512 (2006)). Here, Defendant's exclusion (under a similar title of "Faulty, Inadequate of Defective Planning") applies, where Plaintiff contracted to have an addition to his house constructed, and this construction was found to be one of various reasons that Plaintiff's retaining wall collapsed. Further, Parisi and Archer state that the retaining wall should have been rebuilt prior to the Plaintiff's addition being constructed, as it had been deteriorating for years prior. The holding in *242-44 E. 77th St* shows that the policy reason behind this exception is to protect the insurer from liability where its insured has faulty or defective work completed by a third-party.

Plaintiff offered no admissible evidence or issues of fact in opposition to Defendant's motion as to why the underlying causes of the collapse are covered under its insurance policy, other than Archer's Affidavit from March 28, 2013 which attempts to negate each of the exclusions cited by Defendants.[1] However, the Affidavit is conclusory and speculative and does not raise issues of fact in order to defeat Defendant's motion for summary judgment. "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, ... the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Amaya v. Denihan Ownership Co., LLC*, 30 A.D.3d 327, 818 N.Y.S.2d 199, 200 (2006) *citing Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544, 754 N.Y.S.2d 195, 784 N.E.2d 68 [2002]). Archer's affidavit simply negates each exclusion cited to by Defendants, offering no evidence for which he based his findings. Further, on two prior visits to the premises for inspection (April 8, 2010 and again at the end of May, 2010), Archer found that the collapse of the wall was related to the addition to the residence and later when he reviewed drawings for the addition, he found "the retaining wall is the result of overstress due to the addition." (Archer Deposition, pg. 29). Thus, Archer's conclusory statements in his recent Affidavit were solely to create feigned issues of fact to defeat the motion, and as such, the affidavit is purported no weight in deciding this motion.

Additionally, Plaintiff's cross-motion for summary judgment for breach of contract fails where the loss is excluded from the Policy, precluding coverage. As such, Defendant is under no obligation to pay Plaintiff for his losses.

Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is granted; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that the movant shall serve a copy of this order, with Notice of Entry, upon all parties, within thirty (30) days of entry.

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[1]After the motion was fully submitted (which included an Affidavit from Kevin Archer dated March 28, 2013), Plaintiff's counsel wrote to the court and attached a corrected version of Archer's Affidavit, including the state in which the Affidavit was signed which was omitted from the original. Despite the fact that the corrected version does not contain a certificate of conformity, the Court accepts the corrected version, where Defendant's failed to oppose the original affidavit and as such, waived opposition to the inclusion of the corrected Affidavit.

[* 4]

Dated: AUG 12 2013
New York County

George J. Silver
George J. Silver, J.S.C.

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GEORGE J. SILVER

FILED
AUG 14 2013
COUNTY CLERK'S OFFICE
NEW YORK