

<b>Trezza v New York Cent. Mut. Fire Ins. Co.</b>
2013 NY Slip Op 30111(U)
January 16, 2013
Supreme Court, Suffolk County
Docket Number: 10-43870
Judge: Hector D. LaSalle
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE  
Justice of the Supreme Court

MOTION DATE 7/25/12  
ADJ. DATE 10/9/12  
Mot. Seq. #001 - MotD

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LINDA TREZZA and ANTHONY TREZZA,	:	CREEDON & GILL P.C.
	:	Attorney for Plaintiffs
Plaintiffs,	:	24 Woodbine Avenue, Suite 14
	:	Northport, New York 11768
- against -	:	
	:	JACOBSON & SCHWARTZ LLP
NEW YORK CENTRAL MUTUAL FIRE	:	Attorney for Defendant
INSURANCE COMPANY,	:	99 Jericho Turnpike, Suite 200
	:	Jericho, New York 11753-9800
Defendant.	:	
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Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 15-16; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by the plaintiffs for an order pursuant to CPLR 3212, granting summary judgment on their claims for declaratory relief, is granted to the extent of granting summary judgment declaring that the defendant's disclaimer of coverage is invalid and that the defendant is obligated to provide coverage to the plaintiffs for the claimed damage to their property, and is otherwise denied.

This is an action, *inter alia*, declaring the plaintiffs' right to coverage under a homeowner's insurance policy issued by the defendant.

The plaintiffs own and reside at the property located at 8 Greenbrier Avenue, Farmingville, New York. According to the plaintiffs, on February 1, 2012, two pipes beneath the slab under the kitchen floor burst, causing a sustained leaking of hot water which compromised the foundation and resulted in extensive damage to the home and its fixtures. The plaintiffs promptly notified the defendant of the loss.

In response to the notice, the defendant retained an engineer to conduct an inspection of the premises. The engineer conducted a site inspection on February 18, 2010 and issued a report of his findings on

(RR)

February 22, 2010. While noting his inability to divine the exact cause of the damage because of its subterranean source, the engineer determined that the physical damage to the home was a “direct result of an ongoing water damage event originating from leaking piping” beneath the slab and along the rear wall. As evidence of the damaged piping, he noted an exterior patio expansion board “forced upward” by hydrostatic water pressure at a site directly aligned with the probable leak location below the slab. He also determined that some of the observed damage, including gaps and separations of moldings from first-floor ceilings and misalignments of certain doors, windows, and cabinets, was consistent with a settlement of the slab in the area of the suspected leak.

By letter dated March 9, 2010, the defendant disclaimed coverage for the loss based, *inter alia*, upon language in the policy excluding losses resulting from “earth movement” and “settling.”

Our expert has determined there was long-term water seepage beneath the slab of the home. The water seepage caused soil displacement and earth movement to the ground under the slab. The expert’s conclusion was that there was a pipe leaking into the soil, but [sic] was not able to examine the pipe to confirm the source of the water. There was no direct physical damage caused to the home from the water discharge. In addition, our investigation found the problem with the pipe existed before you purchased the home.

Please be advised that it is the intent of your homeowner policy to afford coverage for losses that are single, sudden, and accidental in nature. In order for there to be coverage, there must be direct physical damage to the home from the water leaking from the plumbing source. As outlined above, the displacement of the soil and the settling of the home, are specifically excluded from coverage. Furthermore, we have not been shown the damaged pipe, and we find your failure to protect the property from further damage has violated the conditions of the policy.

Therefore we must respectfully deny your claim in its entirety.

By letter dated April 8, 2010, the defendant confirmed that it had disclaimed coverage, based on the engineer’s report, because “the direct cause of loss was earth movement and settling” and, further, because “the plumbing problems existed prior to the purchase of the home and before our policy was in force.” This action followed.

The plaintiffs now move for summary judgment invalidating the disclaimer and declaring that the defendant is obligated to provide coverage for their loss. Notwithstanding the defendant’s stated reliance on the engineer’s report, the plaintiffs contend that the reasons cited by the defendant as justification for its disclaimer do not, in fact, appear in that report and, in particular, that nowhere in the report did the engineer advance any opinion that the damage was the result of earth movement beneath the slab. Even assuming, further, that the “earth movement” exclusion were otherwise applicable, the plaintiffs contend that the damage was caused by the displacement of fill beneath the slab, not by the movement of earth, so that the exclusion does not apply in any event.

The plaintiffs annex to their moving papers a copy of the policy, which provides, in pertinent part, as follows:

**SECTION I – PERILS INSURED AGAINST**

**A. Coverage A – Dwelling and Coverage B – Other Structures**

1. We insure against risk of direct physical loss to property described in Coverages **A** and **B**.

2. We do not insure, however, for loss:

a. Excluded under Section I – Exclusions;

\* \* \*

c. Caused by:

\* \* \*

(2) Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:

\* \* \*

(b) Footing, foundation, bulkhead, wall, or any other structure or device that supports all or part of a building, or other structure;

\* \* \*

(5) Any of the following:

\* \* \*

(f) Settling, shrinking, bulging or expansion, including resultant cracking, of bulkheads, pavements, patios, footings, foundations, walls, floors, roofs or ceilings;

\* \* \*

**Exception To Paragraph c.(5)**

Unless the loss is otherwise excluded, we cover loss to property covered under Coverage **A** or **B** resulting from an accidental discharge or overflow of water or steam from within a:

\* \* \*

(ii) Plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance on the “residence premises”. This includes the cost to tear out and replace any part of a building, or other structure, on the “residence premises”, but only when necessary to repair the system or appliance. However, such tear out and replacement coverage only applies to other structures if the water or steam causes actual damage to a building on the “residence premises”.

\* \* \*

## **SECTION I – EXCLUSIONS**

A. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

\* \* \*

### **2. Earth Movement**

Earth Movement means:

- a. Earthquake, including land shock waves or tremors before, during or after a volcanic eruption;
- b. Landslide, mudslide or mudflow;
- c. Subsidence or sinkhole; or
- d. Any other earth movement including earth sinking, rising or shifting;

caused by or resulting from human or animal forces or any act of nature unless direct loss by fire or explosion ensues and then we will pay only for the ensuing loss.

\* \* \*

B. We do not insure for loss to property described in Coverages **A** and **B** caused by any of the following. However, any ensuing loss to property described in Coverages **A** and **B** not precluded by any other provision in this policy is covered.

\* \* \*

3. Faulty, inadequate or defective:

- a. Planning, zoning, development, surveying, siting;
- b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- c. Materials used in repair, construction, renovation or remodeling; or
- d. Maintenance;

of part or all of any property whether on or off the “residence premises”.

“Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage” (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218, 746 NYS2d 622, 625 [2002]; accord *Bread & Butter v Certain Underwriters at Lloyd’s, London*, 78 AD3d 1099, 913 NYS2d 246 [2010]). “To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case” (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652, 593 NYS2d 966, 972 [1993]).

Here, as it is apparently undisputed (and tacitly acknowledged by the defendant) that the plaintiffs’ claim falls within the general coverage provisions of the policy, the only question presented is whether the defendant established the applicability of some exclusion to coverage.

The court finds that it did not. The defendant submits only the affirmation of its attorney, which is of no probative or evidentiary significance (*see e.g. U.S. Natl. Bank Assn. v Melton*, 90 AD3d 742, 934 NYS2d 352 [2011]). Although the attorney refers in his affirmation to certain deposition testimony in which Anthony Trezza is claimed to have acknowledged that there were problems with the plumbing even before he purchased the home, the attorney’s reading of the testimony is not borne out on review of the transcript, nor is it shown how such general knowledge on the plaintiffs’ part might translate to an exclusion from coverage. Even were the court to consider the unsworn statements contained in the report of the defendant’s retained engineer—likewise not in evidentiary form—it would not avail the defendant. As the plaintiffs correctly note, the report does not refer to any movement of earth or soil. To the extent that the defendant may seek to rely on the policy exclusion for “settling,” it is clear that the settlement of the slab described in the report is not so much a physical cause of the loss as an effect. And while the report does make reference to water pressure as a possible cause of the loss, the defendant does not expressly rely on the policy exclusion for “pressure or weight of water” as a basis for disclaiming coverage.


Accordingly, since the defendant failed to present evidentiary proof in admissible form sufficient to defeat the plaintiffs’ right to summary judgment, the motion is granted (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *American Motorists Ins. Co. v Greater N.Y. Mut. Ins. Co.*, 255 AD2d 190, 680 NYS2d 10 [1998]) and the plaintiffs are entitled to a declaration of coverage in their favor.

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The court directs that the claims as to which summary judgment was granted are hereby severed and that any remaining claims for monetary relief shall continue (*see* CPLR 3212 [e] [1]).

The foregoing constitutes the Order of this Court.

**Dated: January 16, 2013**  
**Riverhead, NY**

  
HON. HECTOR D. LASALLE, J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION