[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C.
Justice

PART 11

Index Number : 104753/2010
FSLM ASSOCIATES LLC
vs
ARCH INS. GROUP
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision, order and judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: July 23, 2013

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

----------X

FSLM Associates LLC and First Avenue Builders, LLC,

Plaintiffs,

-against-

Arch Insurance Group, Arch Specialty Insurance Company and Illinois Union Insurance Company,

Defendants.

----------X

Index No: 104753/10

Joan A. Madden, J.:

In this action for declaratory relief as to insurance coverage, plaintiffs FSLM Associates LLC ("FSLM") and First Avenue Builders, LLC ("First Avenue") move for an order pursuant to CPLR 3212, granting summary judgment against defendants Arch Insurance Group and Arch Specialty Insurance Company (collectively "Arch"). Defendant Arch Specialty Insurance Company, incorrectly s/h/a Arch Insurance Group and Arch Specialty Insurance Company, oppose the motion and cross-move for summary judgment.[1]

The following facts are not disputed unless otherwise noted. Plaintiff FSLM was the developer of a condominium building

---

[1]Arch's separate cross-motion to dismiss based on spoliation of evidence, was resolved by this court's order dated June 7, 2012, which directed plaintiffs to provide an affidavit relating to items tested by its expert. The affidavit is annexed to Arch's motion papers as Exhibit K.

located at 40 West 116th Street, New York, New York. Plaintiff First Avenue was the general contractor for the project. Arch issued a commercial general liability insurance policy GAP001061700 to plaintiffs as named insureds, effective from October 10, 2005 through August 31, 2008. The Arch policy had a general aggregate limit of $2 million and a per occurrence limit of $1 million. Defendant Illinois Union Insurance Company ("Illinois Union") issued an excess insurance policy, number G219904A001 to plaintiffs.

Plaintiffs allege that on or about May 22, 2008, a section of the exterior facade of the building collapsed, resulting in property damage. An investigation on behalf of Arch indicated that the damage to the building was $129,342.71. Plaintiffs submitted a claim to Arch and on or about July 14, 2008, Arch sent plaintiffs a letter advising that the claim was barred as it arose "out of [the] exterior insulation and finish system." On or about June 4, 2008, Illinois Union issued a declination letter stating that the claim was "not likely to reach our layer of coverage."[2]

On April 13, 2010, plaintiff commenced this action asserting a first cause of action for a judgment declaring that "the property damage and losses caused by the wall collapse are

---

[2]The Illinois Union letter is dated May 1, 2008, but a fax server stamp indicates that it was sent on June 4, 2008.

covered losses under the Arch and Illinois Union Policies," and a second cause of action for breach of contract seeking $2 million in damages. Defendant Arch answered asserting 22 separate affirmative defenses.

Plaintiffs are now moving for summary judgment against Arch, asserting that no issue of fact exists as to the cause of the collapse and that they are entitled to a "determination" that the resulting damage is covered under the Arch policy. In support of the motion, plaintiffs contend that "the collapse of the wall was caused by a failure of the masonry parging used to level and waterproof the concrete masonry walls" (Kenney affidavit, ¶ 3). Plaintiffs assert that the "concrete masonry parging [was] not part of an exterior insulation and finish system ... [but] was used to level and provide additional waterproofing" (*id.*, ¶ 4). Plaintiffs also assert the exterior insulation and finishing system (EIFS) that was applied was a Parex product consisting of "polystyrene insulation board; woven glass mesh; adhesive; basecoat; [and] finish coat" and the collapse was "due to a cohesive failure of a coating applied to the masonry substrate to which the [Parex EIFS product] was adhesively attached" (*id.*, ¶¶ 6-7). This conclusion is based upon the report of their expert dated January 2, 2009 (*id.*, ¶¶ 2, 3, 5). Accordingly, plaintiffs seek coverage of their claim from Arch.

In opposition, Arch contends that its policy includes an exclusion from coverage for any loss related to an EIFS (Schunk affidavit, ¶¶ 10-11). Arch asserts that the collapse of a portion of the exterior wall of the building was due to the material used in leveling and/or filling the exterior masonry wall of the building (Moses affidavit, ¶¶ 8, 16). Arch explains that the material used is a product known as Parex 121, which is a polymer-modified cementitious material. Arch points to the report of plaintiff's expert which identifies the cause of the accident as "application error or material defect [of the Parex 121]" (*id.*, ¶ 10-11, 13). Arch argues that since Parex 121 was used to level and waterproof the building's exterior wall as part of the preparation for installing the EIFS, the failure of Parex 121 falls within the scope of the policy exclusion for "preparation" for an EIFS (*id.*, ¶¶ 20-22; Schunk affidavit, ¶ 12.

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In

deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

An insurance policy is a contract and, where provisions of a policy are "clear and unambiguous", they should be "given their plain and ordinary meaning" (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]). Additionally, an ambiguity in an insurance policy will be construed in favor of the insured, particularly when the ambiguity is in an exclusionary clause (*Cragg v Allstate Indemn. Corp.*, 17 NY3d 118, 122 [2011]). However, while ambiguities are construed against the insurer, the court should not disregard the plain meaning of the policy to create an ambiguity, since this improperly rewrites the parties' agreement (*United States Fid.*, 67 NY2d at 232; *Catucci v Greenwich Ins. Co.*, 37 AD3d 513, 514 [2nd Dept 2007]). Generally, the insurer has the burden of showing that coverage does not exist or that an exclusion applies (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 627 [1994]; *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]).

Here, the issue presented involves the interpretation and applicability of the policy endorsement entitled "Exterior

[* 7]

Insulation and Finish System Exclusion," which states in its entirety as follows:

> This insurance does not apply to and we will not have the duty to investigate or defend any suit brought against you, or pay any costs or expenses of such investigation and defense for liability, claims, damage or loss arising out of:
>
> 1. "bodily injury," "property damage," or "personal and advertising injury" caused directly or indirectly, in whole or in part, by the design, manufacture, construction, fabrication, *preparation, installation, application*, maintenance or repair, including remodeling, service, correction, or replacement, of an "*exterior insulation and finish system*," *or any part thereof*, any substantially similar system or any part thereof, *including the application or use of conditioners, primers, accessories, flashings, coatings, caulkings or sealants in connection with such a system* [emphasis added]; or
>
> 2. Any moisture-related or dry rot related "property damage" to a house or other building to which an "exterior insulation and finish system" has been applied, if that "property damage" is caused directly or indirectly, in whole or in part, by the "exterior insulation and finish system";
>
> Regardless of any other cause or event that contributed concurrently or in any sequence to that injury or damage.
>
> For the purposes of this endorsement, an "exterior insulation and finish system" means an exterior cladding or finish system applied to a house or other building, and consisting of:
>
> a) A rigid or semi-rigid sheathing or insulation board, including gypsum-based, wood-based, or insulation-based materials; and
> b) The adhesive and/or mechanical fasteners used to attach the insulation board to the substrate; and
> c) A reinforcing mesh that is embedded in a base coat applied to the insulation board; and

> d) A finish coat providing surface texture and color.
>
> However, an "exterior insulation and finish system" does not include a cement-based, polymer-enhanced stucco cladding system which:
>
> a) Incorporates a weather-resistive barrier pursuant to applicable building codes; and
> b) Incorporates ribbed insulation sheathing with ribs aligned vertically to provide drainage; and
> c) The manufacturer of the stucco components has a valid ICBO Evaluation Services Listing in good standing; and
> d) There is no mixing of different manufacturer's products for the stucco system.
>
> So long as that cement-based, enhanced stucco cladding system satisfies all requirements of the applicable model building code and the local building code.
>
> All other terms and conditions of this Policy remain unchanged.

Both plaintiffs' expert witness (Plaintiffs' Expert Report at 1) and Arch's expert witness (Moses affidavit, ¶¶ 19-22) agree that the collapse of a portion of the building's exterior facade, that was the basis of plaintiffs' claim, was the result of the failure of the Parex 121 product that was used to level and/or fill, i.e. parge, the masonry wall before the application of the EIFS. They also agree that the Parex 121 product was not an EIFS and its failure was "due to either an application error or material defect" (*id.*, ¶ 10; Plaintiffs' Expert Report at 1).

Relying on the undisputed fact that Parex 121 failed, plaintiffs argue they are entitled to judgment as a matter of law since, the court, in reviewing exclusionary clauses in an

insurance policy, must "adopt the readings that narrow the exclusions, and result in coverage" (*Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 308 [2009]; *see also Cragg*, 17 NY3d at 122). Plaintiffs' argument is not persuasive, as the court may not "disregard the provisions of an insurance contract which are clear and unequivocal or accord a policy a strained construction" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 131 [1st Dept 2006], *quoting Bretton v Mutual of Omaha Ins. Co.*, 110 AD2d 46, 49, [1st Dept] *affd* 66 NY2d 1020 [1985]). To do so improperly rewrites the parties' agreement (*United States Fid.*, 67 NY2d at 232; *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]; *Broad Street*, 37 AD3d at 131).

As quoted above, the policy exclusion specifically includes the "preparation" and "installation" of an EIFS and the "application or use of . . . coatings, caulkings or sealants in connection with" an EIFS. It is undisputed that the Parex 121 product was used to fill and seal the exterior wall of the building, prior to use of the Parex EIFS. It is also undisputed that the Parex 121 product was used to seal the masonry wall of the building as part of the preparation for application of the Parex EIFS. Consequently, the use of the Parex 121 product is covered by the clear and express terms of the exclusion quoted above, and as such plaintiffs are not entitled to coverage under the Arch policy (*see United States Fid.*, 67 NY2d at 232; *Broad*

Street, 37 AD3d at 131). Defendant Arch is therefore entitled to summary judgment.

In view of the foregoing conclusion and upon a search of the pursuant to CPLR 3212(b), defendant Illinois Union is also entitled to summary judgment.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is denied in its entirety; and it is further

ORDERED that the cross-motion by defendant Arch Specialty Insurance Company, incorrectly s/h/a Arch Insurance Group and Arch Specialty Insurance Company, for summary judgment is granted; and it is further

ORDERED that upon a search of the record pursuant to CPLR 3212(b), defendant Illinois Union Insurance Company is also entitled to summary judgment; and it is further

ORDERED AND ADJUDGED that the second cause of action for breach of contract is dismissed; and it is further

ORDERED, ADJUDGED AND DECLARED that with respect to the first cause of action for a declaratory judgment, defendant Arch Specialty Insurance Company, incorrectly s/h/a Arch Insurance Group and Arch Specialty Insurance Company, and defendant Illinois Union Insurance Company are not obligated to provide coverage to plaintiffs for their claim for property damage allegedly sustained as a result of an incident that occurred on

or about May 22, 2008 at the building located at 40 West 116th Street, New York, New York, as such claim is excluded from coverage under the policy endorsement entitled "Exterior Insulation and Finish System Exclusion."

This constitutes the decision, order and judgment of the court.

DATED: July 23, 2013

ENTER:

J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).