SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 10
Justice

6 MONTAGUE LLC

- v -

NEW HAMPSHIRE INSURANCE COMPANY

INDEX NO. 651133-2010

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to 12, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits —Statement of Undisputed Facts —Memorandum of Law	No(s). 1, 2, 3, 4
Notice of Cross-Motion — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	No(s). 5, 6, 7, 8
Plaintiff's Reply Memorandum of Law	No(s). 9
Defendant's Replying Affirmation — Affidavit(s) — Exhibits	No(s). 10
Defendant's Supplemental Affirmation — Exhibits	No(s). 11
Plaintiff's Supplemental Affirmation	No(s). 12

Upon the foregoing papers, the motion is decided as follows:

In this action for breach of an insurance contract and declaratory judgment, plaintiff 6 Montague LLC ("plaintiff") moves pursuant to CPLR § 3212 for an order granting it summary judgment against defendant New Hampshire Insurance Company ("defendant"). Defendant cross-moves for an order granting it summary judgment and dismissing plaintiff's complaint.

Hal Friedman ("Friedman') testified that plaintiff is the owner of the real property located at 6 Montague Terrace ("the premises"), a residential apartment building consisting of one bedroom and studio apartments. A wooden terrace was constructed on the western face of the premises. Friedman testified that Ray Schultz ("Schultz") and George Spada were the managing agents for the building. Friedman testified that he would periodically go the premises when an apartment was vacated to review the condition of the apartment before renting it. In April 2010 Friedman and Schultz were inspecting a vacant apartment adjoining the wooden terrace. While Friedman and Schultz were in the apartment they saw that the wooden terrace was sloping. Friedman returned to the same apartment a second time and saw the terrace was shifting and that it looked like it was in danger of collapsing. Friedman did not recall having any discussions with the managing agents regarding the condition of the terrace or any repairs that were needed prior to April 2010. Friedman also testified that he was not aware of any complaints by tenants regarding the terrace prior to 2010 and was not aware of any rotting or decay of the terrace prior to April 2010. The terrace had not been inspected by an engineer prior to April 2010. Prior to April 2010, Friedman had never been on the terrace. A contractor was hired and the terrace was ultimately replaced in late 2010.

Schultz, the managing agent of the premises since 1999 when it was purchased by plaintiff, testified that the premises has 20 units on five floors. Schultz believed that most of the wood that

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

comprised the terrace was as old as the building itself. Each studio apartment that adjoined the terrace had a doorway that tenants could use to access the terrace. Schultz testified that in 1999 repair work was done to the terrace. Specifically, a steel horizontal beam and vertical column replacement was done on the first three floors of the terrace to repair obvious wood rot. According to Schultz, all the wood rot was repaired and replaced at that time abnd he never observed any wood rot, deterioration or defects on the terrace from the date the work was completed until April 2010. Schultz also testified that painting and caulking would be performed on the terrace approximately every three years. Schutlz was never informed by the contractor who performed the painting and caulking of any problems with the terrace and did not know of any complaints by tenants regarding the terrace. Schultz also did not know if an engineer ever looked at the terrace between 1999 and April 2010. Schultz testified that he inspected the terrace from the backyard every three months. The last time Schultz performed such an inspection prior to April 2010 he found the terrace to be in good repair. Schultz also testified that he would inspect the terrace from the apartments adjoining it on the occasions when he was able to gain access to those apartments. Schultz testified that he discovered the problems with the terrace in April 2010 when an apartment on the third floor of the premises was vacated. Schultz was inspecting the apartment in order to determine what work, if any, had to be done before it was put on the market when he noticed that the external windowsill was pulling away from the premises's brick facade. Schultz also observed that the terrace itself had pulled away from the building. Schultz testified that this condition was not evident when he looked at the terrace from the backyard. After discovering the damage, Schultz contacted an engineer who evaluated the terrace and determined that it was unstable because of internal decay. The doors to the terrace in the adjoining apartments were closed as a safety measure so tenants could not access the terrace. According to Schultze, no tenant vacated the premises as a result of the condition of the terrace or the work that was done to replace it.

Joseph Vance ("Vance"), a licensed architect, testified that he was contacted by George Cambourakis, a structural engineer, in April 2010 regarding a problem with the terrace at the premises. Vance was retained by plaintiff to act as architect for the replacement of the terrace. Vance inspected the terrace and took photographs of it. Vance testified that the terrace showed visible signs of decay, although he could not testify as to how long the decay had been there.

Michael Walsh ("Walsh"), a licensed engineer, inspected the terraces on May 11, 2010. Walsh testified that a fractured beam above the second floor of the terrace running from a northwest column to a southwest column was a significant factor in causing the downward movement of the terrace. Walsh also testified that the fracture in the beam was "fresh" and that the split was "sudden." The fracture or split, in Walsh's opinion, was deeper than a fascia board that may have been on the beam. Walsh also testified that photographs of the underside of the fractured beam showed evidence of deterioration but could not testify if the deterioration was to a fascia board or to the beam.

With respect to the terms in the insurance policy, Walsh testified that a settlement is a slow, typically vertical displacement of a structure and that it need not always be a downward movement. Walsh testified that a collapse occurs when a structure is no longer capable of withstanding the loads it was designed or intended to support. A collapse need not result in the total destruction of the structure. Walsh also testified that when applied to wood, the terms rot and decay are both forms of deterioration and both are used interchangeably.

Walsh also submitted an affidavit in support of defendant's cross-motion in which he avers that his inspection of the terrace revealed open and obvious defects, including decay, deterioration, rotting and cracking that had been visible and present for a significant period of time prior to his inspection. Specifically, Walsh avers that the fractured beam split because of visible decay, deterioration and general long-term wear and tear. Walsh also avers that fascia board and structural components are not independent entities and if there is rot on fascia board surrounding a beam, there is a high probability of rot inside the beam.

Cambourakis testified that he was contacted by Schultz to inspect the terrace in March of April 2010. Cambourakis testified that the terrace was constructed of two wood columns as well as wood

beams to form the floor of the balconies and of fascia elements that were purely for aesthetic purposes. Cambourakis testified that during his inspection of the terrace from the ground floor of the premises he observed that some of the structures inside the fascia elements were exposed and appeared deflected and deformed. Cambourakis also testified that he observed rotting wood at nearly every level of the terrace. Specifically, Cambourakis testified that from the ground floor all the perimeter beams of the terrace appeared deformed. Deterioration of the underside of the terrace could also be observed from the ground floor. The terrace also appeared to be severely weathered. With respect to the second floor of the terrace, Cambourakis observed that the fascia elements appeared lose and deformed and the posts showed evidence of rot. Cambourakis described the observed rotting as being prevalent throughout the terrace. Cambourakis observed similar decay and rot of the floor, columns and fascia elements of the third floor of the terrace. General decay and rot was seen on the fourth floor of the terrace as well. Cambourakis testified that from the roof he observed that the terrace had pulled away from the brick face of the premises. All of the exposed wood appeared deteriorated as well. Cambourakis testified that he observed settling at the column bases on the ground floor.

Analysis

The multiperil insurance policy at issue herein naming plaintiff as the insured was effective from November 1, 2007 to November 1, 2010. The Additional Coverage section of the policy states that it insures against risk of

> direct physical loss involving collapse of a building or any part of a building caused by one or more of the following:
>
> a) fire; lighting; windstorm; hail; explosion; smoke; aircraft; vehicles; riot; civil commotion; vandalism or malicious mischief; breakage of glass; falling objects; weight of snow, ice or sleet; water damage; all only as insured by this policy;
>
> b) hidden decay.

The policy defines "building(s)" to include "attached additions an extension; fixtures, machinery and equipment constituting a permanent part of and pertaining to the services of the building(s)." The policy excludes coverage for loss caused by "wear and tear, deterioration, rust or corrosion, mould, wet or dry rot, inherent or latent defect . . . settling, cracking, shrinkage, bulging or expansion of pavements, foundations, walls, floors, roofs or ceilings . . ." The terms "collapse" and "hidden decay" are not defined by the policy.

Plaintiff filed a claim for the terrace with defendant on or about April 28, 2010. Defendant denied the claim in writing on July 14, 2010 and September 29, 2010. The July 14, 2010 letter advised Friedman the plaintiff's claim was being denied because the settling of the upper level of the terrace as a result of the failure of the second floor support beam did not constitute a collapse of the building. The letter dated September 29, 2010 further denied plaintiff's claim pursuant to the policy provision excluding loss caused by wear and tear, deterioration, rust or corrosion, wet or dry rot as well as the provisions excluding coverage for losses caused by weather conditions, acts or decisions for any person, group, organization or governmental body and the loss caused by faulty, inadequate or defective planning, design or workmanship.

It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment (*Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial (*id.*). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*). "[C]ourts bear the responsibility of determining the rights or obligations of

parties under insurance contracts based on the specific language of the policies" (*Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868, 501 NE2d 24, 508 NYS2d 416 [1986], *quoting State of New York v Home Indem. Co.*, 66 NY2d 669, 671, 486 NE2d 827, 495 NYS2d 969 [1985]).

Plaintiff, as the policyholder, bears the initial burden of showing that the insurance contract covers the loss (*Roundabout Theatre Co. v Cont'l Cas. Co.*, 302 AD2d 1 [1st Dept 2002]). Plaintiff argues that the record establishes that the damage to the terrace constituted a collapse and that the collapse was caused by hidden decay in the form of a fracture to a structural beam that was not visible because the beam was encased in fascia board. In *Neimer v Liberty Mut. Fire Ins. Co.*, 289 AD2d 1053, the Appellate Division, Fourth Department granted summary judgment to the insureds based upon their showing that their living room collapsed and the defendant insurer's failure to establish that the plaintiffs had knowledge of the decay responsible for causing it. Thus, plaintiff contends that defendant is required to show that plaintiff had knowledge of the decay that caused the damage to the terrace. The question, however, is not one of knowledge but whether the decay to the terrace was visible. While the depositions of Friedman and Schultz establish that plaintiff did not have knowledge of the damage to the terrace until April 2010, the depositions of the architect and engineers who examined the terrace, including the engineer retained by plaintiff, as well as the photographs of the terrace, establish that terrace, as a whole, was in a deteriorated state and that the wood was severely rotted. More importantly, the photographs establish that these signs of decay "were plainly visible without impairment or hindrance of visibility" (*Catucci v Greenwich Ins. Co.*, 37 AD3d 513 [2d Dept 2007]). The fact that plaintiff did not gain knowledge of the obvious wood rot from Schultz's backyard inspections of the terrace or his occasional inspection from one of the apartments adjoining it does not establish that the wood rot was "hidden" and thus covered by the policy. Moreover, plaintiff's claim that the fractured beam was concealed by fascia board is unpersuasive. Photographs of the fractured beam show that the split in the fascia board was open and obvious. Cambourakis testified that the fascia elements of the terrace were loose and exhibited evidence of deformation and Walsh testified that the fracture in the beam, although fresh, was deeper than the fascia board. Since plaintiff has failed to establish that the decay to the terrace was "hidden" plaintiff has failed to establish its prima facie entitlement to summary judgment and it is unnecessary to address whether the loss to the terrace was fortuitous and whether it constituted a collapse as defined by New York case law.

"The standard for determining the applicability of an insurance policy exclusion to a particular claim is well established in New York law. To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion s stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case. Thus, policy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer" (*NFL v Vigilant Ins. Co.*, 36 AD3d 207 [1st Dept 2006] [internal citations omitted]). Defendant has met its burden of establishing its entitlement to judgment as matter of law since the record establishes that the damage to the terrace was caused by deterioration and wet or dry rot, which defendant is not liable for pursuant to the plain meaning of the exclusion provisions of the policy (*see Catucci*, 37 AD3d at 515). Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment is granted and the complaint is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff is to serve a copy of this order, with notice of entry, upon defendant within 20 days of entry.

George J. Silver

George J. Silver, J.S.C.

Dated: JUL 30 2013
New York County

GEORGE J. SILVER