

Klein v State Farm Ins. Co.

2017 NY Slip Op 31680(U)

July 11, 2017

Supreme Court, Suffolk County

Docket Number: 15-8724

Judge: Peter H. Mayer

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

COPY

INDEX No. 15-8724
CAL. No. 16-00998CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 10-28-16
ADJ. DATE 5-19-17
Mot. Seq. # 001 - MD

-----X
EVAN KLEIN and JENNIFER KLEIN,

Plaintiff,

- against -

STATE FARM INSURANCE COMPANY,

Defendant.
-----X

EVAN AND JENNIFER KLEIN
Plaintiffs Pro Se
28 Lindron Avenue
Smithtown, New York 11787

BENNETT, BRICKLIN & SALTZBURG, LLC
Attorney for Defendant
55 Broad Street, Suite 18B
New York, New York 10004

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated September 26, 2016, and supporting papers (including Memorandum of Law dated September 26, 2016); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiffs, dated May 17, 2017, and supporting papers; (4) Reply Affirmation by the defendant, dated May 18, 2017, and supporting papers; (5) Other (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED the motion by defendant for summary judgment for an order dismissing the complaint asserted against it is denied.

Plaintiffs Evan Klein and Jennifer Klein commenced this action after defendant State Farm Insurance Company ("State Farm"), which had issued a homeowner's insurance policy for their residence in Smithtown, New York, denied coverage for damages allegedly caused by the collapse of an in-ground swimming pool. Plaintiffs allege breach of contract, breach of covenant and bad faith, misleading and deceptive conduct, and seek a declaratory judgment. Issue has been joined and discovery is complete.

State Farm now moves for summary judgment pursuant to CPLR 3212 seeking dismissal of the complaint on the grounds that damage to an in-ground pool is not a covered loss under the homeowner's insurance contract. In support of the motion, State Farm submits, among other things, copies of the pleadings; the insurance policy; the deposition transcripts of plaintiffs, and Gerard Peace; and correspondence between the parties. In opposition, plaintiffs submit their own affidavits; the insurance policy; the deposition transcript of Gerard Peace; and correspondence between the parties.

It is undisputed that State Farm issued a homeowner's insurance policy 56-CG-3247-4 to plaintiffs for the premises located at 28 Lindron Avenue, Smithtown, New York. Evan Klein testified that on February 10, 2014, he notified State Farm's agent that plaintiffs' in-ground pool collapsed on February 5, 2014, with a side wall falling into the pool, causing damage to brick, borders and the patio around the pool. On April 4, 2014, State Farm's claim analyst, Gerard Peace, and retained expert, Paul Angelides, inspected plaintiffs' property. Peace testified that the cover of the pool had partially fallen into the pool, that a pool wall collapsed, and that the vinyl pool liner had a tear in it. On April 24, 2014, Angelides issued an engineering report. Thereafter, State Farm covered the damage to the pool liner, but by letter dated May 15, 2014, it denied coverage for the in-ground swimming pool walls, the brick border and the patio surrounding the pool, maintaining the loss was due to a "collapse" that was excluded under the homeowner's policy at issue.

Evan Klein testified that on August 18, 2014, in response to State Farm's decision to deny the claim for coverage, he wrote defendant and explained that damage was caused by an arrow shot into his pool by an unknown deer hunter, which damaged the pool liner, and then led to the pool collapse. Klein testified that after the pool had been inspected he found a piece of an arrow at the bottom of the pool. Thereafter, State Farm denied coverage, maintaining that a swimming pool is not a "building" under the homeowner's policy and that the collapse was not covered, even if caused by an arrow piercing the pool liner.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

State Farm has failed to demonstrate a prima facie case of entitlement for dismissal of the complaint. State Farm has not established that the homeowner's policy excludes the loss alleged herein. It is well settled that a court addressing an insurance coverage dispute must initially look to the language of the subject policy (*Raymond Corp. v National Union Fire Ins. Co.*, 5 NY3d 157, 800 NYS2d 89 [2005]; *State of New York v Home Indem. Co.*, 66 NY2d 669, 495 NYS2d 969 [1985]). The policy is construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*Raymond Corp. v National Union Fire Ins. Co.*, *supra* at 162, quoting

Klein v State Farm
Index No. 15-8724
Page 3

Consolidated Edison Co. of N.Y. v Allstate Ins. Co., 98 NY2d 208, 221-222, 746 NYS2d 622 [2002]). “Unambiguous provisions of a policy are given their plain and ordinary meaning” (*Lavanant v General Acc. Ins. Co.*, 79 NY2d 623, 629, 584 NYS2d 744 [1992]) and ambiguous provisions are construed “against the insurer who drafted the contract” (*State Farm Mut. Auto Ins. Co. v Glinbizzi*, 9 AD3d 756, 757, 780 NYS2d 434 [3d Dept 2004]).

The policy here provides:

Section I - Losses Insured

We insure for accidental direct physical loss to the property described in Coverage A, except as provided in Section I - Losses Not Insured

Coverage A of the Contract provides:

Dwelling

1. Dwelling. We cover the dwelling used principally as a private residence on the residential premises shown in the Declarations.

Section I - Additional Coverages of the policy provides:

10 - Collapse. We insure only for the direct physical loss to covered property involving the sudden, entire collapse of a building or any part of a building.

Collapse means actually falling down or fallen into pieces. It does not include settling, cracking, shrinking, bulging, expansion, sagging, or bowing.

The collapse must be directly and immediately caused by one or more of the following:

- a. perils described in Section I-LOSSES INSURED, COVERAGE B - PERSONAL PROPERTY. These perils apply to covered building and personal property for loss insured by this Additional Coverage;
- b. hidden decay of a supporting or weight-bearing structural member of the building;
- c. hidden insect or vermin damage to a structural member of the building;
- d. weight of contents, equipment, animals or people;
- e. weight of ice, snow, sleet or rain which collects on a roof; or
- f. use of defective material or methods in the construction (including remodeling or renovation) of the building, if the collapse occurs during the course of the construction of the building.

Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf, or dock is not included under items b, c, d, e, and f. unless the loss is the direct and immediate cause of the collapse of the building.

Section I - Losses Not Insured

1. We do not insure for any loss to the property described in Coverage A which consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through n. below, regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

a. collapse, except as specifically provided in SECTION I - ADDITIONAL COVERAGES, Collapse

b. freezing of a plumbing, heating, air conditioning or automatic fire protection sprinkler system, or of a household appliance, or by discharge, leakage or overflow within the system or appliance caused by freezing. This exclusion applies while the dwelling is vacant, unoccupied or being constructed. This exclusion does not apply if you have used reasonable care to:

(1) maintain heat in the building; or

(2) shut off the water supply and drain the system and appliances of water;

c. freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a swimming pool, hot tub or spa, including their filtration and circulation systems, fence, pavement, patio, foundation, retaining wall, bulkhead, pier, pier wharf or dock;

d. theft in or to a dwelling under construction, or of materials and supplies for use in the construction, until the dwelling is completed and occupied;

e. vandalism or malicious mischief or breakage of glass and safety glazing materials if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is considered vacant;

f. continuous or repeated seepage or leakage of water or steam from a:

(1) heating, air conditioning or automatic fire protective sprinkler system;

(2) household appliance; or

(3) plumbing system, including from, within or around any shower stall, shower bath, tub installation, or other plumbing fixture, including their walls, ceilings or floors;

which occurs over a period of time. If loss to covered property is caused by water or steam not otherwise excluded, we will cover the cost of tearing out and replacing any part of the building necessary to repair the system or appliance. We do not cover loss to the system or appliance from which the water or steam escaped;

g. wear, tear, marring, scratching, deterioration, inherent vice, latent defect or mechanical breakdown;

h. corrosion, electrolysis or rust;

i. mold, fungus or wet or dry rot;

j. contamination;

k. smog, smoke from agricultural smudging or industrial operations;

l. settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundation, walls, floors, roofs or ceilings;

m. birds, vermin, rodents, insects or domestic animals. We do cover the breakage of glass or safety glazing material which is part of a building, when caused by birds, vermin, rodents, insects or domestic animals; or

n. pressure from or presence of tree, shrub or plant roots.

However, we do insure for any loss from items a. through m. unless the resulting loss is itself a Loss Not Insured by this Section.

2. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

b. Earth Movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not. Earth movement includes but is not limited to earthquake, landslide, mudflow, mudslid, sinkhole, subsidence, erosion or movement resulting from improper compaction, site selection or any other external forces. Earth movement also includes volcanic explosion or lava flow, except as specifically provided in SECTION I - Additional Coverages, Volcanic Action.

However, we do insure for any direct loss by fire resulting from earth movement, provided the resulting fire loss itself a Loss Insured.

c. Water Damage, meaning:

- (1) flood, surface water, waves, tidal water tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not;
- (3) water below the surface of the ground, including water which exerts pressure on, or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

However, we do insure for any direct loss by fire explosion or theft resulting from water damage, provided the resulting loss itself is itself a Loss insured.

3. We do not insure under any coverage for any loss consisting of one or more of the items below. Further, we do not insure for loss described in paragraphs 1 and 2 immediately above regardless of whether one or more of the following: (a) directly or indirectly cause, contribute to or aggravate the loss; or (b) occur before, at the same time, or after the loss or any other cause of the loss:

b. defect, weakness, inadequacy, fault or unsoundness in:

- (1) planning, zoning, development, surveying, siting;
- (2) design, specifications, workmanship, construction, grading, compaction;
- (3) materials used in construction or repair; or
- (4) maintenance;

of any property (including land structures, or improvements of any kind) whether on or off the residential premises; or

(c) weather conditions.

However, we do insure for any resulting loss from items a, b and c unless the resulting loss is a Loss Not Insured by this Section.

State Farm denied coverage based upon "collapse," earth movement, faulty construction, wear and tear, and water damage exclusions. State Farm's denial is based upon the engineering report of Paul Angelides, P. E., and that report, defendant's exhibit G, is not in admissible form. Accordingly, State Farm has not established from the language of the homeowner's policy that the damage to the plaintiff's pool walls, brick border and patio area was caused by a collapse which would be excluded under the policy. Loss to the swimming pool is specifically excluded in the Additional Coverages section of the policy. However, State Farm has not established a prima facie case that damage to the plaintiffs' pool walls, brick border and patio area surrounding the pool was caused by wear, tear, and the deterioration of the pool liner. Moreover, State Farm has failed to establish that damage was caused by earth movement, which is specifically excluded by the policy State Farm issued to plaintiffs. State Farm has also failed to establish that damage to the pool walls, brick border and patio area was excluded from coverage based upon defects in design and construction

Klein v State Farm
Index No. 15-8724
Page 7

of the pool. The Court finds that the policy provisions are not ambiguous; rather, State Farm failed to provide admissible evidence as to the cause of the loss. Accordingly, the motion is denied.

Dated: July 11, 2017



PETER H. MAYER, J.S.C.