

1750 Dean St. LLC v Norguard Ins. Co.

2020 NY Slip Op 31349(U)

May 11, 2020

Supreme Court, Kings County

Docket Number: Index No. 504199/2018

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 504199/2018
Motion Date: 3-9-20

-----X
1750 DEAN ST. LLC,

Plaintiff,
-against-

DECISION/ORDER

NORGUARD INSURANCE COMPANY,

Defendant.
-----X

The following papers numbered 1 to 3 were read on this motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of aw.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	3
Other.....	

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

In this action for a declaratory judgment, by Notice of Motion dated November 15, 2019, defendant NorGUARD Insurance Company (“NorGuard”) moves for an Order pursuant to CPLR § 3112 granting it summary judgment and declaring that NorGuard has no obligation to cover plaintiff in connection with a March 7, 2016 loss under a policy of insurance issued by NorGuard to the Plaintiff.

Background:

NorGuard issued a commercial property insurance policy to plaintiff effective September 4, 2015 to September 4, 2016 (the “Policy”) covering 1748 Dean Street, Brooklyn, New York (the “Premises”). The property damage coverage provided by the policy is defined as follows:

SECTION I – PROPERTY

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

The Policy defines “Covered Causes of Loss” as follows:

Risks of direct physical loss unless the loss is:

- a. Excluded in Paragraph B. Exclusions in Section I; or
- b. Limited in Paragraph 4. Limitations in Section I.

Paragraph B, entitled “Exclusions” provides:

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes 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.

* * * *

g. Water

(1) Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge);

(2) Mudslide or mudflow;

(3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;

(4) Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces; (b) Basements, whether paved or not; or (c) Doors, windows or other openings; or

(5) Waterborne material carried or otherwise moved by any of the water referred to in Paragraph (1), (3) or (4), or material carried or otherwise moved by mudslide or mudflow.

This exclusion applies regardless of whether any of the above, in Paragraphs (1) through (5), is caused by an act of nature or is otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water. . .

In March 2016, the plaintiff made a claim under the Policy for damages to a unit at the Premises resulting from a burst water pipe. Defendant contends that when the claim was investigated, it determined that the loss was not covered and by letter dated May 16, 2016, the defendant disclaimed coverage stating:

On April 11th, 2016 you have reported that in and around March 7th, 2016 a pipe burst occurred at an adjacent vacant property identified as 1746 Dean Street. The uncontrolled discharge of water entered the lower level of unit 1748 Dean St through the wall, resulting in water related damages to interior finishes. We regret to inform you that water discharged from a containment system that enters through the walls, is not a covered cause of loss.

The defendant maintained that the alleged loss fell within the exclusion to coverage set forth in Paragraph B, (g)(4)(a), which excludes from coverage any

[L]oss or damage caused directly or indirectly by any of the following . . . regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

(g) Water

(4) Water under the ground surface pressing on, or flowing or seeping through: (a) Foundations, walls, floors or paved surfaces; under the ground surface pressing on, or flowing or seeping through: (a) Foundations, walls, floors or paved surfaces;

After NorGuard disclaimed coverage, plaintiff commenced this declaratory

judgment action. NorGuard now seeks summary judgment dismissing the action claiming that the record demonstrates that plaintiff's alleged loss falls within the above exclusion.

In support of the motion, plaintiff relies primarily on the affidavit of Robert Cartagena, one of defendant's Field Property Adjusters, and plaintiff's deposition transcript. Mr. Cartagena's affidavit is conclusory and does not reflect that he had personal knowledge of the cause of plaintiff's alleged losses. He merely stated that "[u]pon its investigation, NorGuard confirmed that the water entered the below-ground unit at the Premises through the adjacent wall" and that "[a]s a result NorGuard denied any coverage for the Loss on May 16, 2016." He did not state the basis for his conclusions.

Plaintiff produced Yona Cohen for a deposition. She and her husband, Shalom Cohen, are the owners of 1750 DEAN ST. LLC and members of Cohen Global, Inc., the company that manages the Premises. She testified that the Premises contains 22 Condominium units that are leased to tenants. Sometime in March of 2016, she became aware that Unit 1 of the Premises, a duplex apartment located at ground level with a basement, suffered water damage when she received a telephone call from Sharon Tracey, the tenant who occupied the unit. Ms. Tracey told her that a pipe had burst, and that water was coming through the walls in the basement of the apartment. Cohen instructed her to call a plumber to stop the leak and apparently, she did so. The plumber advised that he tracked the leak to an adjacent property but was unable to access the property to shut the water off. Eventually, the tenant called 911 and the FDNY accessed the adjacent property and was able to shut off the water. The tenant advised Ms. Cohen that the water was entering her unit via the right side, facing the back.

Analysis:

It is axiomatic that the proponent of a motion for summary judgment must establish "that the cause of action ... has no merit[.]" (CPLR §3212(b)). This requires that a proponent of the motion make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient "evidentiary proof in admissible form" demonstrating the absence of any material issues of fact (*Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316). The movant's failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*William J. Jenack Estate Appraiser and Auctioneers. Inc. v. Rabizadeh*, 22 NY3d 470, 982 NYS2d 813).

Here, defendant failed to meet its initial burden of demonstrating by admissible proof that the damages to Unit 1 was a result of "water under the ground surface which flows or seeps through the foundations, walls, floors or basements" (Paragraph B, (g)(4)(a)). Mr. Cartagena lacked personal knowledge of the cause of plaintiff's alleged losses and provided nothing more than a conclusory affidavit that lacked probative value. Ms. Cohen's testimony was based largely on hearsay (what the tenant of Unit 1 told her) and did not demonstrate that the water that damaged Unit 1 was "water under the ground surface." Her testimony did not rule out that the damage to the walls in the basement was caused by water that flowed into Unit 1 from ground level and trickled down to the basement through the walls.

Since the defendant failed to make a prima facie showing of entitlement to summary judgment, the motion must be denied regardless of the sufficiency of the opposing papers (*William J. Jenack Estate Appraiser and Auctioneers. Inc., supra.*).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is DENIED.

This constitutes the decision and order of the Court.

Dated: May 11, 2020



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020