Humphries v Metropolitan Prop. & Cas. Ins. Co.
2020 NY Slip Op 31819(U)
May 26, 2020
Supreme Court, New York County
Docket Number: 152521/2015
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 58

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JACQUELINE HUMPHRIES and CHARLES OURSLER,

Plaintiffs,

-against-

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY dba METLIFE AUTO & HOME, CAMBRIDGE MUTUAL FIRE INSURANCE COMPANY, HASKELL BROKERAGE CORP., JLNY GROUP, LLC, and FAIRMONT INSURANCE BROKERS, LTD.

Defendants.

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Index No. 152521/2015

Decision and Order on Motions

COHEN, DAVID B., J.S.C.:

Motion Sequence Number 004, in which plaintiffs seek partial summary judgment against defendants Metropolitan Property and Casualty Insurance Company dba MetLife Auto & Home (MetLife) and Cambridge Mutual Fire Insurance Company's (Cambridge), and Motion Sequence Number 008, in which Cambridge seeks summary judgment dismissing the claims against it, are consolidated for disposition and resolved as follows:

Plaintiffs Jacqueline Humphries and Charles Oursler, both of whom are well-known artists, are the owners of 138 Fulton Street (138 Fulton) unit 5. In addition, they own an apartment which comprises 69% of the former unit 4 (the rental apartment). Former defendant Fulton Associates, LLC owns the neighboring building, 140 Fulton Street (140 Fulton) (NYSCEF Doc. Nos. 90, 91).[1] According to the condominium declaration, their units include "the floors of the Building above the wooden floor joist located between the first and second floors of the building together with the ground floor entrance and stairs leading to the second and higher

[1] The case as against Fulton Associates was severed. Ultimately, plaintiffs and Fulton Associates reached a settlement (NYSCEF Doc. No. 89 ¶ 62).

floors, all as shown on the Plans and, including, without limitation all exterior walls of the Residential Units" (NYSCEF Doc. No. 97, § 3). Humphries and Oursler lived in unit 5 part-time with their son,[2] and they rented the rental apartment to longstanding tenants. Humphries also used unit 5 as a studio space and had paintings there.

The condominium declaration required the board of 138 Fulton to obtain insurance. In particular, the board had to insure

> "the Building and the Common Elements . . . against loss by fire or other casualty, water damage, vandalism and malicious mischief, lightning, natural disaster and extended coverage together with all heating, air conditioning and other service machinery contained therein but not including wall, ceiling or floor decorations or coverings of furniture, furnishings, fixtures, equipment or other personal property supplied or Installed by Unit Owners, or Occupants"

(NYSCEF Doc. No. 97, § 21 [a] [i]). The declaration required that the insurance cover the condominium, the board, and the unit owners (*id.*). The declaration further required that its fire and extended insurance coverage "contain waivers of subrogation and of any defense based on co-insurance or pro rata reduction of liability of the insurer as a result of any insurance carried by Unit Owners or of invalidity arising from any acts of the insureds or any Unit Owners" (*id.* § 21 [a] [ii]). The unit owners have an obligation to acquire insurance which "protect[s] the Unit Owner and Board of Managers against any and all liability occasioned by negligence, occurrence, accident or disaster in or about the Unit or any part thereof" (*id.* § 21 [b]).

As is relevant here, The 138 Fulton Condominium (the Condominium) obtained insurance for "the building" from Cambridge policy number SBP 2454332 (*id.* ¶ 44). The portion of the policy contained at BP 17 01 01 97 defines the building to include each unit's fixtures, improvements, and alterations if they are part of the building, and appliances including

[2] The parties also lived part-time at a house on Henry Street in Manhattan, which Oursler owns.

refrigerators, dishwashers, laundry machines "if [the] Condominium Association Agreement requires you to insure it" and the items are not covered by another policy (NYSCEF Doc. No. 96). The policy's scope extended to "Directors and Officers Liability," which protected the directors and officers from lawsuits arising out of their work, and it limited this coverage to $1,000,000 per incident (*id.* at pp 12-14).

In addition, plaintiffs purchased personal insurance coverage for unit 5 from MetLife. The policy, number #1493702200, covered fire, smoke, heat, and water damage to the apartment (NYSCEF Doc. No. 1 ¶¶ 27, 29). The policy provided the following coverage per occurrence: (A) $60,760 for the dwelling, (B) $3,750 for private structures, (C) $75,300 for personal property, (D) $45,180 for loss of use and an additional $4,000 for damage to business property (NYSCEF Doc. No. 98 [MetLife Policy], Declarations, at *1). Under the policy, "'[o]ccurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the term of the policy" (*id.*, at *2). Business property is differentiated from other personal property in that it is "used or intended for use in a business" (*id.*, Policy, at *C-1). The policy provides coverage for loss of use, which includes additional living expenses or fair rental value, at the insured's option. Pursuant to an endorsement, the general definitions for these categories are:

> 2. Under SECTION I – ADDITIONAL COVERAGES:
> A. Item 1. Loss of Use:
> 1. Item A, the first paragraph [in the original policy] is deleted and replaced by:
> A. Additional Living Expense/ Fair Rental Value. This applies upon loss to covered property resulting from a covered cause of loss. When a covered property loss makes that part of the residence premises where you reside not fit to live in, we will pay, at your choice, either of the following. However, if the residence

> premises is not your principal place of residence, we will not provide the option under paragraph 2, below.
>
> 2. In form[] . . . HP2200, Item B., the first paragraph is deleted and replaced by:
>
> B. Loss of Rental Income. This applies upon loss to covered property resulting from a covered property resulting from a covered cause of loss. We will pay your loss of rental income resulting from a covered property loss less charges and expenses which do not continue, while the part of the residence premises you rent to others, or hold for rental, is uninhabitable. Payment will be the shortest time required to repair or replace the rented part. We do not cover the loss or expense due to cancellation of a lease or agreement (NYSCEF Doc. No. 98 [Endorsement, *1]).

On both March 17, 2013 and March 18, 2013, there were fires at 140 Fulton (NYSCEF Doc. Nos. 93, 94) which caused heat, smoke, and water damage to 138 Fulton in its entirety, including unit 4 and unit 5 (NYSCEF Doc. No. 1 ¶¶ 16, 24-25). The March 17 fire started on the second floor of 140 Fulton, and the March 18 fire started on the third floor.[3] Due to the smoke and water damage to 138 Fulton and its foundational instability, the Department of Buildings issued a mandatory vacate order for the building. The residents were unable to reenter their units from March 17, 2013 until October 2, 2013, while the DOB vacate order was in effect (NYSCEF Doc. No. 95). According to Humphries, the lease they issued to the fourth floor tenants ended by virtue of the vacate order (NYSCEF Doc. No. 192, p 20, line 16 - p 21 line 13).[4] In

[3] MetLife and plaintiffs dispute whether these fires are separate "occurrences" within the meaning of the policy. The court discusses this issue below.

[4] The court relies on the full transcripts which MetLife has provided, as plaintiffs only submitted excerpts from the transcripts without proper context. For example, plaintiffs provided pages 18, 21, 25, 49, 101, and 223-224 of the Humphries' transcript (NYSCEF Doc. No. 99), while MetLife submitted the entire 287 pages along with the index (NYSCEF Doc. Nos. 192, 193).

addition, plaintiffs were preparing to rent the fifth floor unit, but did not execute the lease because of the fire (*see* NYSCEF Doc. No. 233 [correspondence and unsigned lease]).

After they had access to the units, plaintiffs hired an architect and contractor and made extensive repairs. According to plaintiffs' counsel, plaintiffs spent $330,000 repairing Unit 5 and $18,000 repairing Unit 4 (NYSCEF Doc. No. 39 ¶¶ 24-25). Prior to the fires, Humphries had been in the process of moving her art studio to Brooklyn (*e.g.*, NYSCEF Doc. No. 192, p 27 lines 15-20), and she had moved the bulk of her artwork to the new studio and to various storage units (*e.g.*, *id.*, pp 35 line 23 – 36 line 5 [regarding the move], p 151 line 2 – p 152 line 15 [listing her storage units]). However, two of Humphries' paintings remained in the apartment[5] and sustained smoke and water damage. Humphries is a renowned artist who has worked extensively with the Greene Naftali Gallery in Manhattan. On June 24, 2014, Jeffrey Rowledge, director of the gallery, valued each painting at $85,000, for a total of $170,000 *(see* NYSCEF Doc. No. 100; NYSCEF Doc. No.116). Plaintiffs allege that the damages to their apartment units totaled at least $525,000, an amount which includes the value of the paintings (NYSCEF Doc. No. 1 ¶ 31).

Plaintiffs filed an insurance claim with MetLife. The file for unit 5 was assigned to Vincent Policano on May 17, 2013. Policano met with Humphries and inspected the unit on July 19, 2013. At his deposition, Policano said that if there was a fire which reignited a few hours later and additional damage resulted, the fire and the reignited fire would be considered part of the same occurrence (NYSCEF Doc. No. 194, 40, lines 5-12). With respect to unit 5, he stated, he could not "ascertain any difference between fire number 1 or the said fire number 2. They all appeared to be one loss to me" (*id.*, 43, lines 12-15).

[5] Humphries explained that after she had moved into the apartment, a beam outside the door of unit 5 had been sheet-rocked, and as a result plaintiffs could not remove the paintings, which were 80 x 80, from the apartment (NYSCEF Doc. No. 192, p 49 lines 12-20).

As for damages, Policano described, "[t]he insured presented damages which included soot damage, smoke damage, water damage, firemanic damage, which was damages created by the fire department to access the fire, as well as three 80-inch by 80-inch oil paintings that were water, soot and smoke damaged" (*id.*, 33, lines 20-25). He issued checks for $36,235 for damage to unit 5, under category A of the policy (*id.*, 50, lines 12-14) and $27,333 for loss of rental income, under category D of the policy (*id.*, 50, lines 20-22). He further determined that the paintings were personal property (*id.*, 53, lines 12-14). Policano discussed the claim with the claim supervisor, Mike Frischberg, and Frischberg stated that more investigation was necessary to decide whether the paintings were personal or business property – that is, whether they were covered under category (C), which provided up to $75,300 per occurrence for loss to personal property, or under the additional coverage of up to $4,000 per occurrence for business property. Policano had the paintings appraised by Art Conservation Associates *(id.,* 52, line 23 –53 line 3; 53, lines 15-20).

Separately, the SIU, an investigations unit at MetLife, conducted an additional interview with Humphries and reevaluated the categorization for the paintings. When Policano asked whether he should conclude the claim, Frischberg informed him that someone else would take over from him (*id.*, 53, lines 13-19). Normally, according to Policano, he continued investigations to their conclusions even after SIU was assigned *(id.*, 56, lines 12-14) but the reassignment was not a breach of protocol. Instead, the decision as to whether to reassign a file was case specific *(id.*, 57, line 23 – 58, line 2). Debra Benvenuto took over the handling of the claim. Benvenuto designated the paintings as business property, and MetLife provided recovery of $4,000 (NYSCEF Doc. No. 102). Plaintiffs state that MetLife ultimately paid them only $77,500 under the policy (NYSCEF Doc. No. 1 ¶¶ 31-32). Plaintiffs further state that Cambridge has not paid for any of the

asserted damages on the ground that plaintiffs are not eligible for recovery under the building policy.

According to plaintiffs, MetLife acted in bad faith when it made excessive demands for documents and delayed even the inadequate payment to plaintiffs. They assert the first cause of action against MetLife for this purported breach. Plaintiffs contend that they are intended beneficiaries of the contract between the Condominium Association and Cambridge. Therefore, they assert the third cause of action for breach of contract against Cambridge as members of the Condominium Association, and they assert the fourth cause of action for breach of contract against Cambridge as third-party beneficiaries of the insurance agreement.[6]

Summary judgment

On a motion for summary judgment, the moving party has the initial burden of establishing its entitlement to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1985]). The facts must be viewed "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposition papers (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). Once the moving party "produces the requisite evidence, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft, LLP*, 26 NY3d 40, 49 [2015] [internal quotation marks and citation omitted]). The court's task in deciding a summary judgment motion is to determine whether there are bona fide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]). If the court

[6] The remaining causes of action are not relevant to the current motions.

is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]; *see Long Is. Sport Dome v Chubb Custom Ins. Co.*, 5 Misc 3d 1028 [A], 2004 NY Slip Op 51593 [U], *2 [Sup Ct, Suffolk County 2004]).

Arguments relating to MetLife

According to plaintiffs, it is undeniable that MetLife must treat the fires as two separate occurrences and compensate plaintiffs accordingly. Plaintiffs also state that the following issues should be resolved against MetLife: 1) MetLife is liable for walls-in coverage for the costs plaintiffs incurred in the renovation of unit 5; 2) Plaintiffs are owed an additional $146,600 for the paintings, which should have been deemed personal rather than business property; 3) MetLife owes plaintiffs an additional $60,000 in loss of use damages; and 4) MetLife is liable for damages for its bad faith administration of their claim.

1. Number of Occurrences.

Plaintiffs argue that the paintings should have been viewed as personal property and that MetLife must compensate them for $150,600 – that is, the maximum coverage of $75,300 for personal property, for each of the two occurrences. Thus, plaintiffs state, this court should find MetLife liable for $206,000 on these claims. Finally, they argue that, without question, MetLife acted in bad faith and is liable for damages. However, plaintiffs' request for summary judgment is only for partial relief, as they assert that the amount of damages arising from MetLife's bad faith should be resolved at trial.

Plaintiffs argue that the question of whether there were one or two insurable occurrences is ripe for resolution in plaintiffs' favor. They quote the language of the policy, which states, in pertinent part, that "[i]f a covered loss occurs at the residence premises, we will pay up to the limit

of liability for personal property for the location shown in the Declarations where the personal property is damaged, destroyed or stolen" (NYSCEF Doc. No. 98 [MetLife Policy], Policy, at *C-1). According to plaintiffs, this language establishes that the coverage is "per loss."[7] They further point to the incident reports, which show that the fires occurred on two different days and on two different floors of the building next door (*see* NYSCEF Doc. Nos. 93, 94).[8]

In support, plaintiffs point to the Second Circuit's decision in *Newmont Mines Ltd v. Hanover Ins. Co.* (784 F2d 127 [2d Cir 1986] [*Newmont*]). In that case, the Court affirmed a jury's determination that the collapse of two separate portions of a roof, both from the weight of ice and snow – the first between March 1 and March 14, 1979, and the second on March 17, 1979 – were two separate occurrences. In particular, as plaintiffs note, the Court stated that the property damage policy at issue "intended to provide coverage for property damage each time it occurred unexpectedly and without design, unless the damage occurring at one point in time was merely part of a single, continuous event that already had caused other damage" (*id.* at 136). Plaintiffs also cite the seminal New York State case, *Arthur A. Johnson Corp. v Indemnity Ins. Co. of N. A.* (7 NY2d 222 [1959]). There, the Court of Appeals ruled that the collapse of two temporary walls of cinder blocks, which protected two adjoining buildings' basements from flooding into each other, comprised two separate occurrences for the purpose of the applicable insurance policy. The Court defined an occurrence as "an event of an unfortunate character that takes place without one's foresight or expectation" (*id.* at 228 [internal quotation marks and citations omitted]). It noted that

[7] Plaintiffs argue that Benvenuto effectively conceded that there were two separate events in her letter which is filed as their exhibit M. However, the letter contains no such concession. It is unclear whether they intended to point to another document.
[8] Plaintiffs also cite the deposition of Fire Marshal Cox (NYSCEF Doc. No. 92), but as they only excerpt a few scattered pages of the lengthy transcript the document is not informative.

each wall had a separate purpose, and the collapses occurred one hour apart although they were the result of the same rainstorm.

In opposition, MetLife states that, undisputedly, only one fire occurred. It notes that the March 18, 2013 Fire Incident Report states that the fire was a "rekindling" (NYSCEF Doc. No. 94) and it argues this conclusively shows the purported second fire was a continuation of the first one. MetLife states that the fire marshal who inspected the fire on March 18 reached this conclusion as well.[9] MetLife relies on the 1976 Second Circuit case, *Champion Intl. Corp. v Continental Cas. Co.* (546 F2d 502, 505 [2d Cir 1976] [*Champion*], *cert denied* 434 US 619 [1977]), for the proposition that the language of the policy should determine the meaning of the term "occurrence." In *Champion*, the Court determined that, in a business policy designed to protect the insured from liability, the installation of 1400 defective panels on vehicles comprised one error. Here, MetLife states, because the policy defines "occurrence" to include "continuous or repeated exposure to substantially the same general harmful conditions," the fire and the rekindled fire are part of the same occurrence. It also argues that the matter is a jury question (citing *Newmont*). In reply, plaintiffs oppose MetLife's argument and reiterate their own.

"Generally, the issue of what constitutes an occurrence has been a legal question for courts to resolve" (*Roman Catholic Diocese of Brooklyn v National Union Fire Ins. of Pittsburgh*, 21 NY3d 139, 148 [2013] [*Roman Catholic Diocese*]). Here, there is not a dispute that on March 17 there was a fire on the second floor, and on the following day there was a rekindling of the fire on the third floor. Therefore, the fact that in some cases factual disputes preclude summary resolution is not pertinent.

[9] The transcript MetLife filed was hard to follow, as the pages were out of order, cut into halves, and missing lines at the top and/or bottom.

Instead, the critical issue is this: Is the rekindling of an extinguished fire one day after the original fire a second occurrence within the meaning of the insurance agreement? In this analysis, the court looks to the contractual terms (*see Dan Tait, Inc. v. Farm Family Cas. Ins. Co.*, 60 Misc 3d 886, 890 [Sup Ct, Albany County 2018]). In its analysis, the court must consider those terms in the context of the facts at hand, considering "the temporal and spatial relationships between the incidents and the extent to which they were part of an undisrupted continuum to determine whether they can, nonetheless, be viewed as a single unfortunate event—a single occurrence" (*Appalachian Ins. Co. v General Elec. Co.*, 8 NY3d 162, 174 [2007] [*Appalachian*]). Thus, where one car hits another and the impact causes the car to hurtle toward a third car, courts have held that there is but one insurable occurrence (*e.g., Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169 [1973]). On the other hand, repeated asbestos exposure at the same facility, or repeated sexual assaults by the same priest (*Roman Catholic Diocese*), are considered separate occurrences even though the underlying problem is the same.

The court has not found cases directly on point on this issue. After careful consideration, however, it concludes that the two fires are separate occurrences within the meaning of the policy. As stated, the second fire, although a rekindling, took place a day after the first. Further, the original fire was "confined and extinguished" on March 17 (NYSCEF Doc. No. 93). In addition, the fires did not occur in the same space, but on different floors of the building. Therefore, there was not the sort of undisrupted continuum the Court of Appeals contemplated in *Appalachian*.

The terminology used in cases in other Departments suggest that courts view rekindlings as second fires when time has passed between the two. In a decision regarding governmental immunity, the Third Department called a rekindled fire which occurred several hours after the initial fire a "second fire" and a "rekindled fire" interchangeably (*see Trimble v City of Albany*,

144 AD3d 1484, 1488 [3d Dept 2016]). In *Puccia v Farley* (261 AD2d 83 [3d Dept 1999]), the plaintiff sued his contractor for the allegedly negligent installation of a woodstove, which in turn resulted in fires which destroyed the plaintiff's home. The Court stated that the fire on January 11, 1995 "was successfully extinguished by the fire department" but that early the next morning "the fire rekindled" and that this "second fire" destroyed the home (*id.* at 84). In *People v Trippoda* (40 AD2d 388, 394 [3d Dept 1977]), an arson case, the Court noted that the rekindling of the fire was "sometimes referred to in the record as the second fire." Although, in another decision involving the question of governmental immunity for negligence, the Second Department did not use the phrase "second fire," it referred to the "rekindling of the *original fire*" (*S.C. Freidfertig Bldrs. v Spano Plumbing & Heating*, 173 AD2d 454, 455 [2d Dept 1991]). Outside of this State, other courts have described rekindlings as second fires (*e.g., Smith v Allstate Ins. Co.*, US Dist Ct, SD Ohio, 1:05-CV-329, Beckwith, CJ, 1961; *State v Allen*, 663 SW3d 686, 689 [Sup Ct, Louisiana 1995]; *Whaley v Rheem Mfg. Co.*, 900 SW2d 296, 302 [Ct App Tennessee, Eastern Section 1995]).

As stated, Policano opined that when a fire reignited after only a few hours had passed, the fire and the reignited fire were part of the same occurrence (NYSCEF Doc. No. 194 at 40, lines 5-12). Further, he indicated that he had treated the fires here as one occurrence because he could not ascertain which loss occurred due to which fire (*id.*, 43, lines 12-15). Policano's statements do not alter the court's conclusion. For one thing, the second fire occurred a day after the first. For another, under Policano's reasoning, two unrelated catastrophes that occurred within hours of each other also would be deemed to be one occurrence because of the difficulties segregating the damage. Thus, although it was reasonable for Policano to adjust the two claims together because he could not separate the damages from each incident, this does not mean that the insurance coverage should be limited to one occurrence.

2. Paintings.

The most significant claim plaintiffs assert against MetLife, from a financial perspective, is that MetLife improperly characterized the two Humphries paintings as business rather than personal property. Plaintiffs state that Humphries did not engage in a continuous activity promoting the paintings for profit, which they state is a requirement for a business (citing *Stewart v Dryden Mut. Ins. Co.*, 156 AD2d 951, 951-952 [4th Dept 1989]). They state that this is consistent with the policy, which would have required that Humphries engaged in "full or part time activity of any kind . . . for economic gain" regarding the two paintings (NYSCEF Doc. No. 98 [MetLife Policy], at *A-1). Among other things, plaintiffs note that the two paintings had not been shown publicly for years, but instead had remained in unit 5; that the works were not listed or featured on the websites of any galleries; that Humphries had painted them in the 1980s and moved to New York with them. Further, they point out that, because a beam outside the door of unit 5 had been sheet-rocked, plaintiffs could not remove the artwork from the apartment. Plaintiffs also contend that the two pieces were part of Humphries' private collection.

In opposition, MetLife notes that courts are reluctant to grant summary judgment on coverage issues unless the evidence is clear and irrefutable (citing *New York Cas. Ins. Co. v Ward*, 139 AD2d 922, 923 [4th Dept 1988] [granting summary judgment]). According to MetLife, there is a plethora of evidence establishing that the paintings are business property. It points out that until shortly before the fire, when she moved her work to a separate facility, Humphries painted at her residence. Therefore, MetLife points out, for years Humphries painted her artwork in unit 5, including numerous pieces that her galleries ultimately sold. Moreover, MetLife stresses, Humphries stated at her deposition that she might sell any of her artwork, even paintings from her private collection, under the right conditions (*see generally* NYSCEF Doc. No. 192, 50 line 17 –

59 line 15). MetLife contends that this establishes the artwork was business property. It distinguishes *Stewart*, upon which plaintiffs rely, by stating that here there was continuity of business and profit motive. Citing *Roland v Nationwide Mut. Fire Ins. Co.* (286 AD2d 872 [4th Dept 2001]), which involved the use of a barn to record music, MetLife states that at least there is a question of fact requiring the denial of summary judgment. MetLife contests the argument that the paintings were in Humphries' personal collection, and it claims that, in fact, she declared the opposite.

The court denies this prong of plaintiffs' motion because triable issues of fact exist (*see also Kennedy v Lumbermen's Mut. Cas. Co.*, 190 AD2d 1053, 1053-1054 [4th Dept 1993] [factual dispute as to whether camera was used for business purpose precluded summary judgment on coverage issue]). The parties have presented their factual allegations, which are controverted. Neither side has accurately characterized Humphries' explanation about how she viewed the two paintings. In fact, she did not state either that they were personal property or that they were part of her personal collection. Instead, she stated that she did not characterize her artwork that way. This was because although she meant to keep certain of her artwork, it was possible that she would consider an offer from a museum or gallery. She did not clearly indicate whether the two paintings at issue were part of her personal collection, though she had not attempted to show or sell them recently, and she did not recall whether she had done so in the past. While MetLife's conclusion that the artwork was business property "may be arguably reasonable, it is not the only interpretation, nor is it the only fair construction of the language" *Pepper v Allstate Ins. Co.*, 20 AD3d 633, 635 [3d Dept 2005] [internal quotation marks and citation omitted]; *see Villanueva v Preferred Mut. Ins. Co.*, 48 AD3d 1015 [3d Dept 2008]). Indeed, the fact that two experienced

adjusters at MetLife reached two different conclusions on this issue shows that there is not one rational determination. Thus, summary judgment is not proper.

3. Loss of Use.

Under the MetLife policy, plaintiffs were entitled to coverage of up to $45,180 per occurrence for loss of use. Plaintiffs received a reimbursement of $27,338 under this provision of the policy.[10] According to Policano, the adjuster who made the payment, this amount was for loss of rental income (NYSCEF Doc. No. 194, 50 lines 20-24). According to plaintiffs, the maximum coverage for loss of use is $90,360, which equals the maximum of $45,180 for two separate fires. Plaintiffs note that they were unable to reside in unit 5 or rent it for around two years, and they state that the agreed-upon rental rate of $5,000 was a fair market value for the apartment. Although the proposed lease was for under a year, plaintiffs contend, because the unit was uninhabitable for two years they should be reimbursed for their loss for the entire period. In their reply papers, they include a copy of Humphries' correspondence with the intended lessee, including the intended lessee's February 8 statement that he planned to move into unit 5 in mid-March and an unsigned copy of the proposed lease (NYSCEF Doc. No. 233). As the loss of use damages total over $90,360, plaintiffs continue, they are entitled to the maximum payment minus the amount they have already received.

MetLife opposes this argument, stating that it fully reimbursed plaintiffs under the terms of the policy. They argue that because a month or so before the fires, Humphries had moved most of her possessions out of the apartment because of her intent to rent it, unit 5 no longer was her

[10] Plaintiffs state that they were reimbursed $36,235.21 for loss of use, but this amount was earmarked for damages to the dwelling under category A of the policy (NYSCEF Doc. No. 98, Declarations, at *1; *see* NYSCEF Doc. No. 194, 50 lines 10-24; NYSCEF Doc. No. 103 [checks specify the category of coverage]).

primary residence, and therefore she was not entitled to recover as a resident or recover for loss of rental income (*see* NYSCEF. Doc. No. 98 [Endorsement, 1]). In addition, because the lease with the potential tenant was not executed, MetLife argues that plaintiffs cannot rely on it to show loss of use. MetLife concludes that there are too many issues of fact to award summary judgment to plaintiffs on loss of use.

The court concludes that summary judgment as to liability is proper, but the amount of damages, if any, must be determined at trial. MetLife's position that plaintiffs cannot recover for loss of rental income is belied by the fact that plaintiffs received a reimbursement of $27,338 for that very loss (*see* NYSCEF Doc. No. 194, 50 lines 20-24; NYSCEF Doc. No. 247). Moreover, the loss covered the entire period from the last days of March through the end of August, when MetLife mailed plaintiffs their check (*see* NYSCEF Doc. No. 247). Thus, the current argument that the rental income is not a covered expense must fail. However, it is unclear why MetLife did not cover the loss after August, as it awarded plaintiffs less than the full $45,180 it could have awarded per occurrence. One of MetLife's objections, the lack of proof that an agreement existed, is obviated by plaintiffs' submission of the proposed lease and the email from the prospective lessee, but this fact does not automatically entitle plaintiffs to a full recovery for a period which extends the period of the unsigned lease agreement.

4. Bad Faith.

The court denies summary judgment as to plaintiffs' claim that MetLife operated in bad faith when it decided that the paintings were business property. To set forth "a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a gross disregard of the insured's interests . . . and that the insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the interests of the insured" (*Liang v Progressive Cas. Ins. Co.*, 172 AD3d

696, 699 [2d Dept 2019] [internal quotation marks and citation omitted]). Here, the alleged bad faith revolves around the replacement of Policano because his supervisor determined that more research was required as to whether the paintings were personal or business property. However, there are issues of fact as to whether the characterization of the artwork was reasonable. Thus, there necessarily are issues of fact as to whether MetLife acted in bad faith when it reconsidered Policano's initial conclusion. Further, as *Jiam Liang* shows, egregious behavior is required before a court or jury finds bad faith interpretation of an insurance policy. Plaintiffs have not irrefutably shown such behavior. Also, contrary to plaintiffs' suggestion, Policano did not indicate that his supervisor's behavior was inherently suspicious. Instead, as stated earlier, although Policano usually continued working on a file even after SIU was assigned (NYSCEF Doc. No. 194 at 56 lines 12-14), the reassignment was not a breach of protocol *(id.* at 57, line 23 – 58, line 2).

Arguments Relating to Cambridge

In their motion, plaintiffs argue that this court should find that Cambridge is liable for "walls out" coverage – that is, coverage for the exterior walls and the exterior framing of plaintiffs' fourth and fifth floor units. They also argue that summary judgment is appropriate against Cambridge as to its bad faith administration of plaintiffs' claim. In response, in motion sequence number 008, Cambridge moves for summary judgment dismissing the claims against it. Cambridge seeks declarations that it is an excess carrier with respect to plaintiffs' damages claims and that plaintiffs are not insured under the Cambridge policy.

In support of plaintiffs' argument that Cambridge is responsible for walls out coverage, plaintiffs point to the Condominium Association Coverage Endorsement, at 17 01 01 97 A.1.a (6), which provides that the Cambridge policy covers fixtures, alterations, and improvements which the building installed and which comprise part of the building or structure, and appliances

including dishwashers, stoves, and refrigerators, to the extent that the condominium requires the Association to insure it (NYSCEF Doc. No. 96, at *87). Therefore, plaintiffs look to the Condominium Association's declaration, which states that the Association will provide insurance for the building and the unit owners which protects against fire, among other hazards, and impacts "heating, air conditioning, and other service machinery contained [within the units] (but not including wall, ceiling or floor decorations or coverings or furniture, furnishings, fixtures, equipment or other personal property supplied or Installed by Unit Owners, or Occupants)" (NYSCEF Doc. No. 97 ¶ 21 [a] [i]). The declaration further provides that this coverage "shall be [of] the broadest form" (*id.* ¶ 21 [a] [ii]). Plaintiffs assert that Cambridge's failure to provide any compensation to them is a violation of the plain language of the policy and thus clearly demonstrates that Cambridge acted in bad faith.

In opposition and in support of its motion for summary judgment (motion sequence no. 008), Cambridge points out that Section 21 (a) (i) of the Condominium Declaration specifically indicates that the Association is not responsible for insuring decorations, furniture coverings, fixtures, equipment, as well as personal property the unit owners installed (NYSCEF Doc. No. 97 ¶ 21 [a] [i]). Cambridge notes that the Businessowners Common Policy Conditions, at section BP 00 09 01 97, states that the coverage is excess to the owners' individual policy coverage (NYSCEF Doc. No. 96, at *84). According to Cambridge, this establishes that it is not responsible for walls-out coverage. Cambridge also cites to the section of the policy entitled "Who is an Insured" for the purposes of insurance for business losses, and it contends that this provision excludes plaintiffs from coverage altogether (NYSCEF Doc. No. 96, at *64).

In addition to these documents, Cambridge relies on the affidavit of Andrew Sarsfield, the Cambridge examiner who reviewed plaintiffs' claim. Sarsfield acknowledges that the unit owners

have limited coverage, but he reiterates that the coverage is excess to their primary insurance. He states that, therefore, the policy does not apply to plaintiffs and does not provide walls-out coverage. Cambridge also includes the affidavit of Daniel Schiano, the independent adjustor who worked with Cambridge on behalf of Steele Associates (NYSCEF Doc. No. 214). Schiano states that, as he lays out in the Steele Report (NYSCEF Doc. No. 217), he does not believe that Cambridge is responsible for walls-out coverage. In particular, he relies on the description of the dimensions of the units contained in the Condominium Association's declaration:

> The Residential Units consist of the areas shown and designated on the "Plan of Residential Units". The Residential Units are measured horizontally from the exterior face of the exterior window or exterior surface of the exterior walls of the Building to the exterior window or exterior surface of the opposite exterior wall or from such exterior window or exterior surface to the middle of the walls and partitions separating such Unit from the Common Elements or other Unit; vertically, the Residential Units consist generally of the space between the underside of the wooden floor joist of the residential Unit and . . . , with respect to Unit 5, the surface of the roof above Unit 5

(NYSCEF Doc. No. 216 ¶ 6 [a] [ii]) Schiano interpreted this provision to mean that there was no coverage (*see* NYSCEF Doc. No. 217, at *31).[11] Cambridge further argues that walls-out coverage does not include the interior of the apartment. Even if there is walls-out coverage, Cambridge contends, plaintiffs are not entitled to compensation from Cambridge. Cambridge states that based on the clear language of the policy, the MetLife policy is primary. Therefore, it is only responsible for excess coverage. Cambridge stresses that it is not responsible for plaintiffs' remodeling costs.

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[11] Citing *Board of Mgrs. of Vil. View Condominium v Forman* (78 AD3d 627 [2d Dept 2010]), Cambridge states that the condominium by-laws set forth the respective rights of the parties. However, the court notes that Cambridge is relying on the declaration, which describes the building and units and the parties' insurance and other obligations (*see, e.g., Collins v Hayden on Hudson Condominium*, 223 AD2d 434, 435-436 [1st Dept 1996]), rather than the by-laws, which set up the system of governance and administration, provide the board member qualifications, and oversees the association and its maintenance.

It contends that plaintiffs have no insurable interest in the property and therefore any purported coverage of their property would be void (citing *Etterle v Excelsior Ins. Co. of N.Y.*, 74 AD2d 436, 438 [4th Dept 1980]; *see Castle Oil Corp. v ACE Am. Ins. Co.*, 137 AD3d 833, 836 [2d Dept 2016], *lv denied* 27 NY3d 908 [2016]).

In their reply in further support of their motion and in opposition to Cambridge's motion, plaintiffs state that they are covered under the policy. In addition to their earlier arguments, they assert that a portion of their maintenance fees covers the Cambridge policy. They file excerpted pages from Cambridge's adjuster's deposition transcript, which suggests that there is coverage for the walls, ceilings, and fixtures inside the apartment as long as the unit owners did not replace or improve them (NYSCEF Doc. No. 245). They cite the preliminary comments of Schiano, the independent adjuster, in the Steele report – in particular, his opinion that the policy covers the individual "units with the exception of personal property and modifications belonging to the original unit owners" (NYSCEF Doc. No. 217, at *6) – as evidence that some coverage was available to the unit owners. They note that Schiano also made similar comments following his examination of the unit (*id.*, at *25-26). In fact, plaintiffs point out, Schiamo provided a list of those damages to unit 5 and unit 4A for which Cambridge was responsible:

- Set air filtration to "wash" air in affected area
- Remove affected sheetrock
- Remove affected insulation
- Damp wipe of structure with Expert 828 Heavy Duty Degreaser
- Application of liquid deodorizer to all finishes
- Application of odor blocking encapsulate to all exposed framing

(*id.*, at *56). Based on the above, plaintiffs contend there was walls-out coverage. Plaintiffs state that a plain reading of the policy and the declaration, in context, supports their position. They also argue that many of Cambridge's statements implicitly or expressly acknowledge its obligation as an excess carrier. According to plaintiffs, this obliges Cambridge to cover MetLife's shortfall. In

addition, plaintiffs cite *Matter of Galaxy Ins. Co.* (257 AD2d 351, 351 [1st Dept 1999]) for the proposition that they are covered by the policy even though their names are not listed within it. Further, plaintiffs reiterate their position that Cambridge's denial of their claim establishes plaintiffs' right to summary judgment as to Cambridge's liability for bad faith.

After careful consideration, the court grants motion sequence number 004 in part and denies motion sequence number 008. The above language in the Cambridge policy, viewed as a whole, makes it clear that the walls, ceilings, and floors of the units are covered under the policy as long as they are in their original form; that certain appliances and fixtures are covered if either they were installed as part of the original unit or the association required the unit owners to install them. Cambridge's arguments to the contrary lack merit and, moreover, are internally inconsistent. The facts that plaintiffs are not individually named as insured and that the "Who is Insured" section does not list the unit owners are not relevant because the policy contains a Condominium Association coverage which clearly includes certain parts of the unit owners' apartments. Further, Cambridge's notes that the policy provides plaintiffs with excess coverage – which, by itself, is an admission that there is some coverage. Neither plaintiffs nor Cambridge have provided evidence as to how much, if anything, MetLife paid for these covered expenses, and how much, if anything, Cambridge owes on its excess. It also is not clear whether any of the asserted costs are attributable to improvements or to fixtures or appliances plaintiffs voluntarily added. For these reasons, the court grants summary judgment on the issue of Cambridge's liability under the policy, with the above limitations. For the same reason, it denies Cambridge's motion sequence number 008.

The court denies the prong of motion sequence number 004 that seeks summary judgment on liability on the issue of Cambridge's bad faith. Plaintiffs have shown that Cambridge's independent adjuster and its own deposition witness acknowledged Cambridge bore some

responsibility for repayment. Nonetheless, Cambridge denied plaintiffs' claim in its entirety. Though this is strong evidence that Cambridge ignored the advice of its experts and misinterpreted its own policy, the court cannot say as a matter of law that Cambridge engaged in the "gross disregard of the insured's interests" and "evince[ed] a conscious or knowing indifference to the interests of the insured" (*Liang*, 172 A.D.3d at 699). Further, as plaintiffs concede, an adjudication of damages will be necessary regardless of the court's decision. It is more prudent to leave the entire matter to the trier of fact.

The court has considered the parties' arguments, even those that are not expressly addressed here. Accordingly, for the reasons above, it is

ORDERED that motion sequence number 004 is granted in part and denied in part; and it is further

DECLARED that MetLife is obliged to compensate plaintiffs for two occurrences; and it is further

ORDERED that the remaining issues against MetLife raise jury questions and plaintiffs' request for judgment on these issues is denied; and it is further

DECLARED that Cambridge is obliged to compensate plaintiffs for their unreimbursed expenses to the limited extent outlined above; and it is further

ORDERED that the portion of plaintiffs' motion seeking summary judgment on the issue of Cambridge's bad faith is denied; and it is further

ORDERED that motion sequence number 008 is denied in its entirety.

Dated: May 26, 2020

ENTER:

DAVID B. COHEN, J.S.C.