

Foundation for the Elderly v Oxford Coverage, Inc.

2020 NY Slip Op 34398(U)

December 23, 2020

Supreme Court, Kings County

Docket Number: 524848/2017

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of December, 2020.

PRESENT:

CARL J. LANDICINO, J.S.C.

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FOUNDATION FOR THE ELDERLY, d/b/a
ROCKAWAY MANOR HOME FOR ADULTS,

Index No.: 524848/2017

Plaintiff,

DECISION AND ORDER

-against-

Motion Sequence #6

OXFORD COVERAGE, INC.,
MACDUFF UNDERWRITERS, INC. and
UNITED NATIONAL INSURANCE CO.,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	115-128
Opposing Affidavits (Affirmations).....	132, 134-159
Reply Affidavits (Affirmations)	160-166
Memoranda of Law	129, 133

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Plaintiff Foundation for the Elderly, d/b/a Rockaway Manor Home for Adults (hereinafter the “Plaintiff”) brings this action and raises causes of action for negligence, breach of contract and special duty. The Plaintiff alleges in its Complaint that Defendants Oxford Coverage Inc. and/or MacDuff Underwriters Inc. (hereinafter “Defendant Oxford”) obtained insurance on its behalf with Defendant United Insurance Co. (hereinafter “Defendant United”). Further, the Plaintiff contends that it suffered damages at the insured premises located at 145 Beach 8th Street, Far Rockaway, NY (the “Premises”) on

February 14, 2016 and the Defendants improperly declined to indemnify the Plaintiff for the damages suffered at the Premises pursuant to the insurance policy.

Defendant United now moves (motions sequence #6) for an order pursuant to CPLR 3212 granting it summary judgment against the Plaintiff, dismissing the Plaintiff's cause of action for breach of contract against Defendant United (Plaintiff's fourth cause of action), together with such other and further relief as this Court may seem just and proper. Defendant United contends that the alleged damages to the Premises suffered by the Plaintiff resulted from frozen sprinkler water pipes that burst on the third and second floors of the Premises. As a result, Defendant United contends that it properly denied coverage based on the sprinkler leakage exclusion language of the policy. Defendant United argues that summary judgment should be granted as the clear and unambiguous terms of the policy dictate that the Plaintiff's claim is excluded under the sprinkler leakage exclusion. Defendant United also contends that the Complaint should be dismissed as there is no basis for Defendant United to indemnify the Plaintiff.

The Plaintiff opposes the motion and argues that it should be denied. The Plaintiff contends that the motion should be denied, as a review of terms and conditions of the policy support the position that there are issues of fact regarding whether the insurance policy provides that damages related to sprinkler leakage are conditioned upon whether the Plaintiff failed to maintain adequate heat, or performed draining of the system, at the building. What is more, the Plaintiff contends that the Sprinkler Leakage Exclusion Endorsement was improperly included in the policy. Specifically, the Plaintiff contends that there are issues of fact relating to whether Defendant United requires the inclusion of the Sprinkler Leakage Exclusion only for policies relating to vacant properties. The Plaintiff argues that Defendant United was informed that the Premises would be occupied and that as a result the subject endorsement should have been removed from the policy, as the underwriting guidelines do not require its inclusion

for occupied buildings. Also, the Plaintiff contends that there are issues of fact related to whether the damages sustained resulted primarily from the sprinklers at the Premises or a broken water main owned and controlled by the City of New York.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of a triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

“As a general rule, the construction of terms and conditions of an insurance policy that are clear and unambiguous presents a question of law to be determined by the court.” *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co.*, 36 AD3d 645, 645, 828 N.Y.S.2d 479, 480 [2nd Dept 2007]. “Any ambiguity, however, must be construed against the insurer as the drafter of the policy.” *NIACC, LLC v. Greenwich*

Ins. Co., 51 AD3d 883, 884, 857 N.Y.S.2d 723, 724 [2nd Dept 2008]. “Such exclusions or exceptions from policy coverage must be specific and clear in order to be enforceable, and they are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction.” *Gaetan v. Firemen's Ins. Co. of Newark*, 264 AD2d 806, 808, 695 N.Y.S.2d 608, 610 [2nd Dept 1999].

Defendant United issued a Building and Personal Property Coverage policy to the Plaintiff (hereinafter referred to as “the Policy”). The Policy provides coverage for damages or loss at the Premises, unless otherwise excluded, subject to other terms and conditions contained in the Policy. The Policy conditionally excludes coverage for loss or damage caused by water or other liquids flowing from certain equipment (except fire protective systems) as part of a Causes of Loss-Special Form at CP10300695:

B. EXCLUSIONS

2. We will not pay for loss or damage caused by or resulting from any of the following:

g. Water, other liquids, powder or molten material that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protective systems) caused by or resulting from freezing unless:

- (1) You do your best to maintain heat in the building or structure; or
- (2) You drain the equipment and shut off the supply if the heat is not maintained.

The Policy also contains an endorsement that modifies the Causes of Loss Special Form in form CP 10560695 which states:

SPRINKLER LEAKAGE EXCLUSION This endorsement modified insurance provided under the following:

CAUSES OF LOSS – BASIC FORM CAUSES OF LOSS – BROAD FORM CAUSES OF LOSS- SPECIAL FORM

A. The following is added to the EXCLUSIONS section and is therefore not a Covered Cause of Loss:

SPRINKLER LEAKAGE

Sprinkler Leakage, meaning leakage or discharge of any substance from an Automatic Sprinkler System, including collapse of a tank that is part of the system.

But if Sprinkler Leakage results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

E. EXCLUSION 2 g. in the Cause of Loss – Special Form, is replaced by the following:

We will not pay for loss or damage caused by or resulting from water, other liquids, powder or molten material that leaks or flows from plumbing, heating, air conditioning or other equipment caused by or resulting from freezing, unless:

- (1) You do your best to maintain heat in the building or structure; or
- (2) You drain the equipment and shut off the supply if the heat is not maintained.

Turning to the merits of Defendant United's motion, the Court finds that Defendant United has shown that the language of the subject policy was sufficiently clear and unambiguous to establish, for the purposes of this motion, that the Plaintiff is not covered for claimed losses caused by sprinkler leakage at the Premises. Defendant United has shown that the Policy excludes coverage for loss or damage caused by the sprinkler system. Although the policy also provides that certain losses will only be covered if the policy holder does their "...best to maintain heat in the building or structure," or drains "...the equipment and shut[s] off the supply if the heat is not maintained," a sprinkler system is explicitly excluded from the equipment referenced in that provision (e.g. plumbing, heating). Accordingly, the Policy, clearly bars coverage to the Plaintiff for damages caused by sprinkler leakage. "Such exclusions or exceptions from policy coverage must be specific and clear in order to be enforceable, and they are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction." *Gaetan v. Firemen's Ins. Co. of Newark*, 264 A.D.2d 806, 808, 695

N.Y.S.2d 608, 610 [1999]. The terms of the policy in relation to this issue are not subject to another interpretation in this court's opinion.

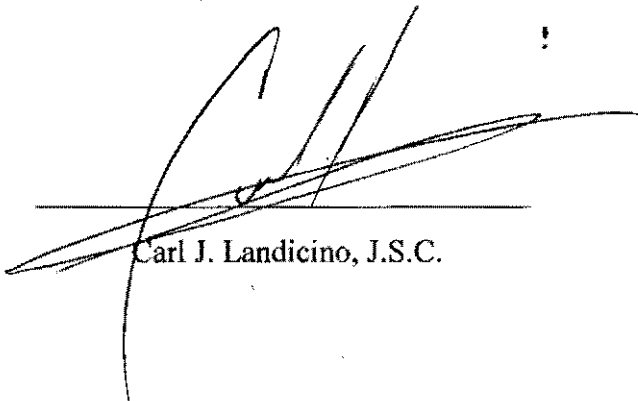
In opposition, the Plaintiff has failed to raise an issue of fact as to whether the Plaintiff should have received coverage under the Policy for sprinkler leakage. In opposition to the motion, the Plaintiff contends that the Sprinkler Leakage Exclusion only applies when the Plaintiff has failed to maintain heat in the building or fails to drain the system at the time of loss. However, the Court has already determined that the question of maintenance of heat, or draining, is not material, in that the clear language of the insurance agreement provided that sprinkler leakage was not covered at all. Notwithstanding the above, the Defendant has not addressed losses claimed by Plaintiff that were allegedly not directly caused by sprinkler leakage (e.g. sprinkler system repair, water damage due to water main break). Therefore, the motion for summary judgment must be denied.

Based upon the foregoing, it is hereby ORDERED as follows:

Defendant United's motion (motion sequence #6) for summary judgment is denied, except to the extent that Plaintiff's claim for property damages alleged to have been directly caused by sprinkler leakage are dismissed. Plaintiff's claim for damages caused by other means shall continue.

The foregoing constitutes the Decision and Order of the Court.

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Carl J. Landicino, J.S.C.

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