SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 20
NASSAU COUNTY

STATE FARM FIRE & CASUALTY COMPANY as Subrogee of JUNG EUN PARK,

Plaintiff,

-against-

OTSEGO MUTUAL INSURANCE COMPANY,

Defendant.

MOTION # 01
INDEX # 606444/2019
MOTION SUBMITTED: JUNE 11, 2020

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The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits.....2
Reply Affidavits.....3

Defendant moves for summary judgment pursuant to CPLR §3212.

This subrogation action arises out of an oil leak from two underground storage tanks which were located on property of State Farm's subrogee. State Farm asserts that the leakage began approximately 19 years before it was discovered. During the majority of this time (from December 7, 2009 until March 10, 2016) Ostego provided homeowner's insurance to the subrogee. State Farm seeks reimbursement from defendant Otsego for the payments it made to its insured for the loss occasioned by the leak during the term of the Ostego policy.

Defendant's Position

Defendant asserts that the plain and unambiguous language of the policy provides that soil contamination from an oil leak is not a covered risk. In support of this position defendant references the following policy provisions:

A) The first unnumbered paragraph of form ML-20, which states, "This policy, subject to all of its terms, provides: insurance against loss to property, personal liability insurance and other described coverages during the policy period in return for payment of the required premium. It consists of this Agreement, the Declarations, the General Policy Provisions, Perils Section, Liability Coverage Section, and any endorsements made part of it ..."

B) Subdivision a) of paragraph 7 on ML-20, page 1, which describes the premises insured as "that house, related private structures and grounds at the location set forth in the Declaration."

C) The section entitled "Coverage A-Residence" which states "This policy covers the residence on the insurance premises including additions and built-in components and fixtures . . . [it does not cover] land, including land on which the dwelling is located.",

D) Paragraph 12 of ML-20 which defines the term residence stating "residence means a one to four family house..."

E) The section entitled Coverage A which includes only the "Residence" as "the building on the insured premises".

F) The section entitled "Coverage B" which states there is coverage for permanently installed fixtures on the grounds; but does not include any damage to land.

G) The sections entitled "Coverage A " and "Coverage B" which both specifically state that "land including land on which the dwelling is located" is not an included coverage.

H) The section entitled "Incidental Property Coverages" which states "b) Debris Removal- We pay for the removal of debris of covered property following an insured loss. . . This coverage does not include costs to: 1) extract pollutants from land or water; or 2) remove, restore or replace polluted land or water."

Plaintiff's Position

Plaintiff contends that language of the Otsego policy *is* ambiguous in that it affords inconsistent meanings to certain terms. The policy includes the term "grounds" as part of the "insured premises". According to plaintiff the terms: "grounds" and "land," are conflated within the Otsego policy and susceptible to two different meanings. Plaintiff contends that since "grounds" itself is described as "insured premises," reasonable minds can disagree as to whether or not land is included as part of "grounds" or whether the two terms have the same meaning.

Plaintiff also asserts that the oil contamination, was accidental leakage covered under paragraph 5

of form ML-3T entitled "Seepage or Leakage," which states: "5. Seepage or Leakage-We do not pay for loss caused by repeated or continuous seepage or leakage of liquids or steam from within a plumbing, heating or air-conditioning system, water heater or domestic appliance. Except as provided above, we pay for loss caused by the accidental leakage, overflow, or discharge of liquids or steam from a plumbing, heating or air-conditioning system or domestic appliance."

In support of its position that the 19 year leak was an accidental leakage, plaintiff cites *State v. Aetna Cas. & Sur. Co.*, 155 A.D.2d 740, 741, 547 N.Y.S.2d 452 (1989) which held:

> In a prior case most similar to the instant case, this court held that the phrase "sudden and accidental" in these policies "should be construed in its entirety, without undue reliance upon discrete definitions of the two operative words that make up the phrase" *(Colonie Motors v Hartford Acc. & Indem. Co.*, 145 AD2d 180, 182), and the phrase should always be "construed in the context of the facts of each particular case" *(supra,* at 182; *see, County of Broome v Aetna Cas. & Sur. Co.*, 146 AD2d 337, 341-342, *lv denied*). Of significance to the issue at hand, this court has also stated that the fact that a discharge is not immediately discoverable and continues for a period of time "should not move an otherwise covered occurrence within the rather shadowy perimeter of the exclusion" *(Colonie Motors v Hartford Acc. & Indem. Co., supra,* at 183).

Plaintiff also cites *Allstate Ins. Co. v. Klock Oil Co.*, 73 AD2d 486, 426 NYS2d 603 [4th Dept, 1980]). In which the court found that the word "sudden" as used in liability insurance need not be limited to an instantaneous happening. The court held that the negligent installation or maintenance of a gasoline storage tank could result in an accidental discharge or escape of gasoline which would be both sudden and accidental, though undetected for a substantial period of time.

Discussion

"[C]ourts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies" (*State of New York v. Home Indem. Co.*, 66 N.Y.2d 669, 671, 495 N.Y.S.2d 969, 486 N.E.2d 827; *see Cali v. Merrimack Mut. Fire Ins. Co.*, 43 A.D.3d 415, 416, 841 N.Y.S.2d 128). An exclusion from coverage "must be specific and clear in order to be enforced" (*Essex Ins. Co. v. Pingley*, 41 A.D.3d 774, 776, 839 N.Y.S.2d 208, *quoting Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311, 486 N.Y.S.2d 873, 476 N.E.2d 272; *see Lee v. State Farm Fire & Cas. Co.*, 32 A.D.3d

902, 903, 822 N.Y.S.2d 559). An ambiguity in an exclusionary clause must be construed most strongly against the insurer (*see Ace Wire & Cable Co. v. Aetna Cas. & Sur. Co.*, 60 N.Y.2d 390, 398, 469 N.Y.S.2d 655, 457 N.E.2d 761; *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 353, 413 N.Y.S.2d 352, 385 N.E.2d 1280). However, "the plain meaning of the policy's language may not be disregarded to find an ambiguity where none exists" (*Atlantic Balloon & Novelty Corp. v. American Motorists Ins. Co.*, 62 A.D.3d 920, 922, 880 N.Y.S.2d 112; *see Cali v. Merrimack Mut. Fire Ins. Co.*, 43 A.D.3d at 417, 841 N.Y.S.2d 128). Where an insurer denies coverage based upon an exclusion, the burden is on the insurer to demonstrate that the exclusion applies in the particular case and that it is "subject to no other reasonable interpretation" (*Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d at 311, 486 N.Y.S.2d 873, 476 N.E.2d 272)."

The plain language of the Ostego policy stands unambiguously for the fact that the policy did not include coverage for damage to land. The affirmative coverage provisions of the policy included only the residence building itself, accessory structures and fixtures located on the land. The loss occasioned by damage to the land is not covered under this language. The specific exclusion provisions of the policy include soil contamination. But there is an exception for contamination resulting from "accidental leakage...".

In *Northville Industries Corp. v. National Union Fire Insurance Co. of Pittsburgh, PA.*, 218 A.D.2d 19636 N.Y.S.2d 359 (2nd Dept. 1995) the court gave a detailed analysis of a "sudden and accidental" leakage exclusion. The court held,

> "Northville urges that any inquiry into the suddenness of a particular discharge should focus upon an "expectation" element, so as to render "sudden" any release of pollutants which is "unexpected." The contention is not without some support in New York case law. For example, in *Allstate Ins. Co. v. Klock Oil Co.* (73 A.D.2d 486, 426 N.Y.S.2d 603), the Appellate Division, Fourth Department, observed in dicta that an alleged gasoline leak from an underground tank at an automobile dealership could have been both "sudden and accidental" because it was unexpected and unintended, even though it went undetected for a substantial period of time. Similarly, in *Colonie Motors v. Hartford Acc. & Indem. Co.* (145 A.D.2d 180, 538 N.Y.S.2d 630), the Appellate Division, Third Department, reasoned that waste oil emanating from a crack in an underground pipe was "sudden and accidental" where it was unexpected, unintended, and was not readily discoverable. In *State of New York v. Aetna Cas. & Sur. Co.* (155 A.D.2d 740, 547 N.Y.S.2d 452), the Appellate Division, Third Department, concluded that a leak from an underground gasoline tank which occurred over many years could nevertheless be "sudden and accidental" because it remained undetected and because

neither the owner of the storage tank nor the owners of the property in which the tank was situated had been aware of the leak. Likewise, in *Petr–All Petroleum Corp. v. Fireman's Ins. Co.* (188 A.D.2d 139, 593 N.Y.S.2d 693), the Appellate Division, Fourth Department, found that a gasoline leak could be "sudden and accidental" where the underlying complaint could be interpreted to allege an accidental and unexpected leak from a subsurface pipe or tank which continued undetected for a period of time. Furthermore, to the extent that Northville relies upon the Appellate Division, Fourth Department, cases to read a discovery rule into the "sudden and accidental" exception, we note that the exceptions in the policies at issue contain no language indicating that an insured's awareness of or ability to reasonably detect the discharge of pollutants has any impact upon whether that discharge is "sudden." We refuse to vary the unambiguous terms of the subject clauses in this case by reading such a provision into them (*see, Technicon Elecs. Corp. v. American Home Assur. Co., supra*, at 140, affd 74 N.Y.2d 66, 76, 544 N.Y.S.2d 531, 542 N.E.2d 1048, *supra*). Hence, we do not consider the decisions in *Allstate Ins. Co. v. Klock Oil Co.* (73 A.D.2d 486, 426 N.Y.S.2d 603, *supra*) and *Petr–All Petroleum Corp. v. Fireman's Ins. Co.* (188 A.D.2d 139, 593 N.Y.S.2d 693, supra) to constitute persuasive authority on the issue of suddenness.

While Northville, (*supra*) primarily addressed the policy term "sudden"the Second Department made it clear that accidental is a separate term, which applies to an unexpected occurrence, even if it is one that occurs over a long period of time. "Moreover, while the Appellate Division, Fourth Department, adheres to an expectation analysis in evaluating whether a given release of pollutants is 'sudden,' we find that such an analysis ignores any meaningful distinction between the independent requirements of 'sudden' and 'accidental,' and instead suggests that both elements are satisfied where the discharge is merely 'unexpected,' regardless of the length of time over which it occurs. **In our view, such an approach contradicts the plain meaning of the term "sudden" and reduces it to a superfluous requirement in contravention of the settled principle that every term in an insurance agreement is deemed to have some meaning and should not be assumed to have been idly inserted."** *Id.*, (emphasis supplied).

In the case at bar, the term "sudden" is not at issue. The Ostego policy covers leakage emanating from a heating system that is "accidental", the meaning of which is that the occurrence is unexpected even if it was not discovered for a long time.

It is,

DECLARED and DECREED that OSTEGO MUTUAL INSURANCE COMPANY, is obligated to

defend and indemnify plaintiff, as subrogee of the Insured, pursuant to the terms of defendant's policy with respect to the oil spill that occurred on the Property during the time that defendant's policy was in effect; and it is

ORDERED, that plaintiff is awarded judgment in the sum of $44,171.69 together with the costs and disbursements of this action.

Settle judgment on notice.

ENTER

DATED: October 5, 2020

HON. JACK L. LIBERT
J.S.C.

ENTERED
Oct 13 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE