

<b>AIG Prop. Cas. Co. v Harleysville Worcester Ins. Co.</b>
2021 NY Slip Op 31201(U)
April 7, 2021
Supreme Court, New York County
Docket Number: 651603/2019
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 57

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AIG PROPERTY CASUALTY COMPANY F/K/A CHARTIS  
PROPERTY CASUALTY COMPANY

Plaintiff,

- v -

HARLEYSVILLE WORCESTER INSURANCE COMPANY,

Defendant.

INDEX NO. 651603/2019

MOTION DATE 01/04/2021,  
01/04/2021

MOTION SEQ. NO. 002, 003

**DECISION + ORDER ON  
MOTION**

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HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 113, 114, 116, 118, 119, 120, 121, 122, 123, 124, 125 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 115, 117, 126, 127, 128, 129, 130, 131, 132, 133 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

In motion sequence 002, Plaintiff AIG Property Casualty Company f/k/a Chartis Property Casualty Company (“AIG”) moves pursuant to CPLR § 3212 granting AIG summary judgement against defendant Harleysville Worcester Insurance Company (“Harleysville”) in the sum certain of \$1,717,161.78 together with interest from March 31, 2017.

In motion sequence 003, Harleysville moves pursuant to CPLR 3212 for summary judgment dismissing Plaintiff’s Complaint in its entirety and pursuant to CPLR 3001 for a declaratory judgement stating that Harleysville is not obligated to satisfy the judgment entered against its former insured, Martack Corp. (“Martack”), in the subrogation action of *AIG Property*

*Casualty Company f/k/a Chartis Property Casualty Company a/s/o Joseph Edelman, et ano. v. Property Markets Group, Inc., et al.* bearing New York County Index No. 157701/2015 (the “Subrogation Action”).

The motions are consolidated for decision in the following order.

### **Background**

In the present action, AIG is seeking a declaration pursuant to Insurance Law §3420(a)(2) that Harleysville was obligated to indemnify its insured, Martack, for an unsatisfied judgment in the subrogation action *entitled AIG Property Casualty Company f/k/a Chartis Property Casualty Company a/s/o Joseph Edelman, et ano. v. Property Markets Group, Inc., et al.* bearing New York County Index No. 157701/2015 (the “underlying action”) under a Commercial General Liability Policy issued by Harleysville to Martack Corp. bearing Policy No. MPA00000065958H for the Policy Period February 1, 2012 to February 1, 2013.

At issue in this matter is Harleysville’s denial of any duty to indemnify Martack. Harleysville denied coverage on the ground that the liability policy was cancelled on February 1, 2013, prior to the date of the subject loss, which was September 9, 2013. AIG contends that the denial of coverage was improper as the subject loss was discovered on September 9, 2013 but had occurred prior to February 1, 2013.

In support of AIG’s motion, it submits an expert Affidavit of Christopher R. Pushman, P.E, which states that Mr. Pushman was retained by the Building to inspect and determine the cause of the water damages (NYSCEF Doc. No. 67). Mr. Pushman concluded that the excessive condensation water and leaking condition was caused by the HVAC system’s chilled water pipes being improperly insulated and that condensation water had been leaking from the time the HVAC system was turned on, which was no later than when the subject apartment was moved

into, October 2006. AIG contends that the subject loss occurred continuously over a period of time where the Harleystown policy was in effect. In opposition, Harleystown contends that pursuant to its policy, the alleged “property damage” must have occurred during the relevant policy period for coverage to apply. Harleystown argues that the property damage occurred on or around September 9, 2013 and as such, there is no coverage as by that date, Harleystown had ceased covering Martack.

In support of Harleystown’s motion, Harleystown contends that it properly denied coverage to Martack and is not obligated to satisfy the judgment obtained against Martack in the Underlying Action. In opposition, AIG alleges that the damage occurred over a continuous time period during which the Harleystown policy was in effect.

### Analysis

“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 issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). The evidence presented in a summary judgment motion must be examined in the “light most favorable to the party opposing the motion” (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1<sup>st</sup> Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).



Neither of the pre-discovery summary judgment motions made have established a *prima facie* entitlement to judgment as a matter of law. There remain significant questions of material fact as to the date(s) over which the property damage occurred and further, whether during those dates the Harleysville policy was in effect. Accordingly, both Harleysville and AIG's motions for summary judgment are denied.

It is hereby,

ORDERED that AIG's motion for summary judgment is denied and Harleysville's motion for summary judgment is denied; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

4/7/2021

DATE

SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: