SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA JAMES** **PART 59**

Justice

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COLIN HARRINGTON,

Plaintiff,

- v -

BERKLEY INSURANCE COMPANY D/B/A BERKLEY ONE,

Defendant.

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INDEX NO. 652332/2020

MOTION DATE 10/12/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, it is

ORDERED that the cross motion of defendant Berkley Insurance Company for summary judgment on plaintiff's first cause of action seeking a declaratory judgment that defendant is obliged to provide further Additional Living Expense coverage under Berkley One Homeowners Policy Number CO04176206 to such plaintiff, is granted, and a declaratory judgment shall be rendered in defendant's favor; and it is further

ORDERED that the motion of plaintiff for summary judgment on his first cause of action seeking a declaratory judgment that defendant is obliged to provide further Additional Living Expense

coverage under Berkley One Homeowners Policy Number CO04176206 to such plaintiff, is denied; and it is further

ADJUDGED and DECLARED that defendant herein is not obliged to provide further Additional Living Expense coverage under Berkley One Homeowners Policy Number CO04176206 to plaintiff; and it is further

ORDERED, ADJUDGED and DECLARED that the foregoing judgment in favor of defendant, with costs upon the filing of an appropriate bill of costs, shall be entered.

DECISION

Statement of Facts

Since January 2016, plaintiff has been a shareholder and tenant under a proprietary lease of Apt. 11B (the Unit), of the building known as 718 Broadway, New York, New York, which building is owned by non-party 718 APTS., Inc. (the Co-op). He purchased the Subject Policy around July 2019. One month later, he discovered that the ceiling of the Unit had sustained damages.

Plaintiff filed a claim for AEL coverage under the subject policy, stating that the Unit had been rendered uninhabitable by the condition of the roof. On September 11, 2019, defendant acknowledge the claim, stating, in relevant part- "Type of Loss: water damage." On September 30, 2019, defendant wrote plaintiff:

> Can you forward the contact information for your Coop Association and/or the Building Manager?

> We would like to reach out to them in regards to their roof assessment and expected timeframes to complete the needed repairs."

In adjusting the claim, defendant secured temporary housing for plaintiff, in which he moved in October 2019. Under a six months license agreement (October 1, 2019 to March 31, 2020), with an option to extend monthly, and a 60 day vacate notice provision, defendant provided ALE Coverage to plaintiff, including use and occupancy of the temporary housing for six months.

On October 3, 2019, defendant issued two advance checks, in the amounts of $11,968.82, for hotel lodging, meals and transportation and $10.045.60, for costs of moving into temporary housing, to plaintiff. On October 31, 2019, defendant issued a check to the temporary housing lessor for $206,500.00, which comprised the amounts for the sixth month rental and the real estate broker and administrative fees for the temporary housing.

On October 31, 31, 2019, defendant wrote plaintiff, in pertinent part:

> "As stated in the policy, the policy covers the increase in your living expenses for the shortest reasonable amount of time. We have paid for a six month lease to allow enough time for the repairs. The lease expires on March 31, 2020. Any delays will not be considered."

In its report dated November 8, 2019, National Forensic Consults (NFC), an engineering company retained by defendant, set forth the results of its inspection of the Unit and roof area, concluding, in pertinent part:

> "Water infiltration was not observed during the inspection.
>
> ***
>
> "Failure of the ceiling plaster is attributed to improper design of the rooftop modifications to the elevated deck as point-loads were improperly directed on the roof beams. A lack of engineering design, and failure to produce and secure proper building permits, has contributed to the damages to the interior of the subject risk."

In its report dated January 20, 2020, Construction System Group Inc., the engineering firm hired by plaintiff, stated, in relevant part:

> "We conclude that the damage to the plaster ceiling was caused by the construction activities of the rooftop elevated deck in 2012, which changed the applied loading into the structural roof system. The city files obtained do not include the structural design for the new rooftop deck.* * *
> For many years, snow loading on the roof was a distributed load. Once the elevated deck was constructed, the distributed snow load became a series of point loads where the new elevated desk posts transferred the snow load onto the supporting roof structure. The snow loads are cyclical in nature. It took several years for the cyclical deflections from the snow loading at the new point load locations to finally cause damage to the plaster ceiling observed in 2019."

In a letter dated March 4, 2020, to plaintiff's attorney, counsel for defendant wrote:

> At the time Berkley One initially provided ALE coverage, the full cause and extent of the loss had not yet been ascertained. Accordingly, Berkley One decided to provide ALE payments as the details of the loss were not yet determined and it was necessary to evaluate whether a "covered loss" required Mr. Harrington to vacate the premises. However, as you repeatedly acknowledge in your letter, the reason Mr.

> Harrington was ultimately required to vacate the Unit was due to roof damage within the Unit and structural damage to the building itself. Specifically, you allege that 'certain damage was sustained to the ceiling to the Unit as a result of the prior construction of a roof deck on the [the] Building.' You continue to assert that this damage 'made the Unit uninhabitable pending the repair of the Damage and related structural issues.' As discussed above, damage to the roof of the Unit and any structural damage to the building are not a 'covered loss' to Mr. Harrington's 'contents' or 'additions or alterations.' Therefore, Berkley One is under no obligation to provide any ALE coverage, which requires that a 'covered loss' be the reason the Unit was made uninhabitable."

DISCUSSION

This court concurs with defendant that only a "covered loss" that renders the residence premises uninhabitable is covered under the Subject Policy. *See* Siegel v Chubb Corp, 33 AD3d 565, 566 (1st Dept 2006) (no coverage for extra living expenses where residence vacated due to toxins caused by mold, where policy contained a mold exclusion.)

Section II.B.4 "Loss of Use" provision of the Homeowners Insurance Policy Number CO04176206 that plaintiff purchased from defendant (the Subject Policy), provides coverage where a "covered loss to your 'contents' or 'additions and alterations' makes the 'residence premises' not fit to live in". With respect to Additional Living Expense (ALE) coverage, Section II.B.4(a) "Loss of Use" states, in pertinent part:

> "If the 'residence premises' is your primary residence, we will pay the necessary reasonable increase in living expenses incurred by you so that your household can maintain its normal standard of living. . . We cover this increase for the shortest reasonable amount of time required to restore the 'residence premises' to a habitable condition. . ."

The Subject Policy, Section II.D.7, Exclusions, Faulty, Inadequate or Defective Planning, states, in pertinent part,

> "The following exclusions apply to Section II-Property Coverage.
>
> ***
>
> "We do not cover any loss caused by faulty acts, errors or omissions of you or any other person in maintenance, construction or planning. It does not matter whether the faulty acts, errors or omissions take place on or off the 'residence premises'."

The Subject Policy, Section II.D.20(d), Exclusions, Structural Movement states, in pertinent part,

> "The following exclusions apply to Section II-Property Coverage.
> ***
> "We do not cover any loss caused by the settling, shrinking, bulging or expansion, including resultant cracking, of the following:
> ***
> Walls, floors, roofs, or ceilings."

There is no dispute, and the engineering firm hired by the plaintiff and defendant, respectively, found, that the cause of the failing ceiling in the Unit was the improper design of the roof deck that resulted in a change in the "point loads" that transferred the weight of the roof onto beams, the pressure of which caused damage to the ceiling of the Unit. Such structural movement and the faulty acts of 718 APTS, Inc. in causing such

errors in weight bearing are explicitly excluded as "covered losses" under the Subject Policy. Thus, plaintiff having failed to meet his burden of demonstrating that structural movement and the faulty acts of 781 APT., Inc. were not the proximate cause of the loss, defendant is entitled to a summary declaratory judgment in its favor. *See* Hritz v Saco, 18 AD3d 377, 378-379 (1st Dept 2005).

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8/10/2022
DATE

DEBRA JAMES, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE