

Potoff v Chubb Indem. Ins. Co.

2008 NY Slip Op 31458(U)

May 23, 2008

Supreme Court, New York County

Docket Number: 0106265/2006

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

MARTIN SHULMAN

PRESENT:

J.S.C.

PART 1

Justice

Index Number : 106265/2006

POTTOFF, REEVA

vs.

CHUBB INDEMNITY INSURANCE COMPANY

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 106265-06

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

are read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-D

~~Cross-Motion*~~
Answering Affidavits — Exhibits A-H

Replying Affidavits +Opp. to Cross-Motion; Exhs. P-R

Reply Aff. on Cross-Motion

Cross-Motion: Yes No

<u>1,2,3</u>
<u>4,5</u>
<u>6</u>
<u>7</u>

Upon the foregoing papers, it is ordered that this motion and cross-motion are
decided in accordance with the attached decision
and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
MAY 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 23, 2008

MARTIN SHULMAN

J.S.C.

Check one: FINAL DISPOSITION

J.S.C. NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
REEVA POTOFF,

Plaintiffs,

Index No. 106265/06

-against-

Decision & Order

CHUBB INDEMNITY INSURANCE COMPANY,

Defendant.

FILED
MAY 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
SHULMAN, J.:

Defendant Chubb Indemnity Insurance Company ("Chubb" or "defendant") moves pursuant to CPLR 3212(a) for summary judgment dismissing the complaint. Plaintiff Reeva Potoff ("Potoff" or "plaintiff") cross-moves for partial summary judgment as to liability.

The following facts are undisputed. Potoff resides, and has a studio, on the fourth floor of a five-story co-operatively owned building (the "Building") located at 101 Prince Street in Manhattan. During the very early morning of July 6, 2005, after there had been a heavy rainstorm, plaintiff was awakened by three of her neighbors and found that large quantities of water were cascading through the ceiling and into her apartment. The neighbors' apartments had also been flooded. One of those neighbors, non-party Betty Tompkins, who lives on the third floor, had called 911. The firemen who were dispatched walked up to the roof of the Building, and one of them removed a plastic bag that had been clogging the roof drain. Thereupon, the approximately 18 standing inches or more of water that remained on the roof flowed out through the drain. The water that had descended into the apartments in the Building had come down through various fissures in the roof. The issue that divides the parties is whether the damages to plaintiff's apartment are covered by her insurance policy with Chubb, policy number 11762865-01 (the "Policy").

The complaint alleges two causes of action sounding in breach of contract, the first with reference to damages to plaintiff's personal property, and the second with reference to damages to improvements in her apartment.

As an initial procedural matter, Chubb contends that the cross motion is untimely, inasmuch as it was served more than 60 days after Potoff filed her note of issue and this court's preliminary conference order directed that any dispositive motion be made within 60 days of such filing. A cross motion made in response to a still pending and timely motion for summary judgment may be considered, even though it would not have been timely if made as an initial motion. Osario v BRF Constr. Corp., 23 AD3d 202 (1st Dept 2005); James v Jamie Towers Housing Co., Inc., 294 AD2d 268 (1st Dept 2002), affd 99 NY2d 639 (2003). A contrary rule would make little sense, given that CPLR 3212(b) allows a court to grant summary judgment to a party other than the moving party, even if such party has not made a cross motion.

The Policy is a "named perils," rather than "all-risks," policy. Thus, damages are covered only if they were caused by one or another of the perils specified in the Policy. Here, the relevant peril that the Policy covers is "accidental discharge or overflow from within a plumbing ... system. . ." Feit Aff., Exh. L, at Bates 117084. Chubb does not dispute that the subject roof-drain constitutes a "plumbing ... system." Chubb expanded this specified peril by providing that "this peril includes damage from water and water borne material which backs up from within sewers or drains." See Exh. B to Cross Motion.

Chubb argues that the blockage of water in the roof drain did not cause an accidental discharge or overflow from within the drain and that, in any event, the proximate cause of Potoff's damages was the passage of water through the roof. The latter argument requires little discussion. If the accumulation of water on the roof resulted from an accidental overflow from within the roof drain, then the fact that the water had to pass through the surface of the roof in order to damage plaintiff's property does not alter the fact that such damage was directly caused by the overflow. The roof, whether portions of it were weakened by the water or not, was merely the setting through which the water passed.

Kennel Delites, Inc. v T.L.S. NYC Real Estate, LLC, 49 AD3d 302 (1st Dept 2008), which Chubb brings to this court's attention, is not to the contrary. In that case, the plaintiff, whose insurance policy excluded coverage for certain damages if they were caused by rainwater, argued that the damages suffered were caused by debris from a neighboring house that clogged a drainpipe, thereby causing rainwater to collect on the roof and enter the building through the roof. The court held that the efficient cause of the damage was the rainwater, not the debris which caused the drain to be clogged, and that the exclusion applied. Here, too, the rainwater that had collected on the roof, and that then came down through it, was the efficient cause of the damage to plaintiff's property. The issue here, however, is not what the efficient cause of Potoff's damages was, but whether the water that caused those damages was an accidental overflow from the subject drain. It is undisputed that the water that damaged plaintiff's apartment had been blocked from flowing down the drain. The dispositive question is whether that accidental blockage caused "a discharge or overflow from within a ... plumbing ... system," or a backing up from a drain.

"The tests to be applied in construing an insurance policy are common speech and the reasonable expectation and purpose of the ordinary businessman." Ace Wire & Cable Co., Inc. v Aetna Cas. & Sur. Co., 60 NY2d 390, 398 (1983) (citations omitted). Under those tests, where water that normally would go down a drain is stopped from doing so by an obstruction in the drain, the resulting overflow is an overflow from within the plumbing system. It is undisputed that the plastic bag clogged the drain. See e.g. Chubb's Mem. of Law in Support of Motion, at 4 and 7. Accordingly, some water entered the drain, then continuously overflowed once the drain's capacity was exceeded.

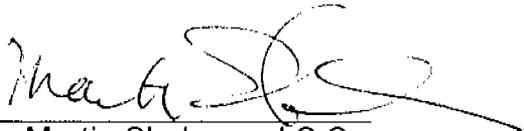
Accordingly, it is hereby

ORDERED that defendant's motion is denied; and it is further

ORDERED that plaintiff's cross motion is granted to the extent of granting partial summary judgment to plaintiff as to liability against defendant Chubb Indemnity Insurance Company and the issue of the amount of damages thereon shall be determined at the trial herein. The parties are directed to proceed to mediation.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
May 23, 2008


Hon. Martin Shulman, J.S.C.

FILED
MAY 29 2008
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NEW YORK