Northeastern Fine Jewelry v Hanover Ins. Group, Inc.
2020 NY Slip Op 33756(U)
April 13, 2020
Supreme Court, Schenectady County
Docket Number: 2018-1137
Judge: Michael R. Cuevas
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[* 1]

STATE OF NEW YORK SUPREME COURT

COUNTY OF SCHENECTADY

PRESENT: HON. MICHAEL R. CUEVAS
JUSTICE OF THE SUPREME COURT

NORTHEASTERN FINE JEWELRY,

Plaintiff,

DECISION AND ORDER

Index No.: 2018-1137

RJI No.: 46-1-2018-0167

-against-

THE HANOVER INSURANCE GROUP, INC., and

MASSACHUSETTS BAY INSURANCE COMPANY,

Defendants.

NOTICE:

PURSUANT TO ARTICLE 55 OF THE CIVIL PRACTICE LAW AND RULES, AN APPEAL FROM THIS JUDGMENT MUST BE TAKEN WITHIN 30 DAYS AFTER SERVICE BY A PARTY UPON THE APPELLANT OF A COPY OF THE JUDGMENT WITH PROOF OF ENTRY EXCEPT THAT WHERE SERVICE OF THE JUDGMENT IS BY MAIL PURSUANT TO RULE 2103 (B)(2) OR 2103 (B)(6), THE ADDITIONAL DAYS PROVIDED SHALL APPLY, REGARDLESS OF WHICH PARTY SERVES THE JUDGMENT WITH NOTICE OF ENTRY.

APPEARANCES:

Christopher Flint, Esq., Cooper Irving & Savage, for Plaintiff.

Brendan S. Byrne, Esq., Mura & Storm, PLLC for Defendants.

MICHAEL R. CUEVAS, J.S.C.

INTRODUCTION

Defendants The Hanover Insurance Group, Inc., and Massachusetts Bay Insurance Company ("Defendants") bring a motion for summary judgment pursuant to

CPLR §3212. Plaintiff, Northeastern Fine Jewelry ("Plaintiff") opposes the Motion, while concurrently filling a Cross-Motion for Summary Judgment.

This is a Declaratory Judgment action brought by Plaintiff to have the Court determine that insurance coverage for a denied insurance claim for damage to its commercial property in Manchester Vermont exists under Plaintiff's policy with Defendant. Both the motion for summary judgment and cross-motion for summary judgment will be addressed in this Decision and Order. There are two main questions this Court must answer: (1) whether the vacancy clause in the insurance policy/contract between Plaintiff and Defendants applies to bar the claim for damages, and (2) whether the terms of the contract, including the vacancy clause are ambiguous and unenforceable, or at a minimum ambiguous enough to create a triable issue of fact to defeat summary judgment.

FACTUAL BACKGROUND

A. CONTRACT

Plaintiff entered into a contract with Defendant for a policy of insurance to cover its store located at 4620 Main Street, Manchester Vermont ("the premises") with an effective term from January 4, 2016 to January 4, 2017. *Byrne Aff.*¶9, *Ex. F.* Notably, Massachusetts Bay Insurance Company is a wholly-owned subsidiary of The Hanover. *Byrne Aff.* ¶4, *Ex. A*, *Complaint*, ¶4. The insurance contract consisted of a broad form, all-risk policy, which means that the insured's loss is covered unless it is limited or excluded by other terms of the policy.[1] *Byrne Aff.*¶9, *Ex. F.* At page 45, the contract lists covered causes of loss, including water damage. It defines "water damage" to mean "accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of any part of a system or appliance (other than a sump system including

[1] "We will pay for direct physical loss of or damage to Covered Property, at the premises described in the Declarations, caused by or resulting from any Covered Cause of Loss, except as limited or excluded within this policy from or any endorsements making up the entire policy." *Byrne Aff.*¶9, *Ex. F*, *Contract, I A.*

its related equipment and parts) containing water or steam." *Id.* The contract also includes a vacancy exception, which provides that there will be limited coverage for vacant buildings. *Id.* The terms "building" and the term "vacant" have the meanings set forth in Paragraphs (a) and (b) of the policy below:

> (a) When this policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.
>
> (b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is (i) rented to a lessee or sublessee and used by the lessee or sub-lessee to conduct its customary operations
>
> (2) Buildings under construction or renovation are not considered vacant
>
> b. Vacancy Provisions
>
> If the building where the loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:
>
> (1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:
>
> (a) Vandalism
> (b) Sprinkler leakage, unless you have protected the system against freezing
> (c) Building glass breakage
> (d) Water damage
> (e) Theft
> (f) Attempted theft
>
> (2) With respect to Covered Causes of Loss other than those listed in Paragraphs (1)(a) through (1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

Id., Contract, E(7)(a)(1).

B. CLAIM/REMEDIATION

Ray Blesser, owner of Plaintiff Northeastern, made a claim for damages to his store located at 4620 Main Street, Manchester, Vermont that occurred on or about December 18, 2016. *Byrne Aff. ¶16, Ex. H, Resp. to Notice to Admit, No. 10.* Blesser

owned the Manchester building outright. *Byrne Aff. ¶8, Ex. E, Blesser Tr., 4, 13-14.* At the time of the damage, the building was for sale. *Byrne Aff. ¶8, Ex. E, Blesser Tr. 22-23.* On December 16, 2016, the building's realtor reported that the location had no heat. *Byrne Aff. ¶8, Ex. E, Blesser Tr.,33-34.* In response, Blesser called the propane delivery man to start the furnace. *Byrne Aff. ¶8, Ex. E, Blesser Tr., 34-35.* Blesser then called Bill DeGroff at 21st Century, who repaired a broken pressure switch on the furnace. *Byrne Aff. ¶8, Ex. E , Blesser Tr.,33-37.* In the days following DeGroff's repair of the furnace, the man who used to plow snow from the grounds noticed water coming out of the building's front door and reported it to Blesser. *Byrne Aff. ¶8, Ex. E, Blesser Tr.,37-38.* Blesser called Bill DeGroff to go back to the premises and also called SERVPRO and informed them that the building had water damage and to go and check it out. *Byrne Aff. ¶8, Ex. E, Blesser Tr.,38-39.* SERVPRO performed remediation services. *Byrne Aff. ¶8, Ex. E, Blesser Tr.,38-41.*

The initial report was made to Defendants by Dawn Wood, a Northeastern employee, on December 19, 2016. *Byrne Aff. ¶8, Ex. E, Blesser Tr., 39-44.* Defendants sent a coverage declination letter on January 10, 2016.[2] *Donahue Aff. ¶14, Exs. B,C.* On February 28, 2017, July 17, 2017, and August 14, 2017, Plaintiff's public adjuster World Claim Global Claims Management requested Defendants reconsider their decision. *Donahue Aff. ¶¶14, 15, 16, Ex. A.* Defendants denied the claim again on August 14, 2017. *Donahue Aff. ¶16, Ex. D.* Plaintiff made another formal request for reconsideration on August 30, 2017, which Defendants never responded. *Flint Aff. ¶15, Ex. B.* On February 7, 2018 and February 23, 2018, Counsel for Plaintiff, Friedman, Hirschen & Miller, LLP, made additional pleas to Defendants for coverage. *Donahue Aff. ¶17, Exs. E, F.*

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[2] Notably, Plaintiff argues that John Lilly, investigator for Defendants, sent Plaintiff a copy of his estimate for damages on Hanover letterhead dated January 5, 2017, advising that a check was issued. *Lilly Aff. ¶6, Ex. A.* But, the check was never processed, and Hanover later denied the claim. *Flint Aff. ¶13.* This is not a material fact that would lead the Court to find a triable issue of fact exists.

C. Manchester Store- Vacancy

Plaintiff admits that prior to May 14, 2016, the premises was a storefront open to the general public and its customary operations were to sell and repair jewelry. *Byrne Aff. ¶16, Ex. H, Resp. Notice to Admit 1-5.* On or before May 14, 2016, Northeastern ceased its customary operations in Manchester, and closed its store, and hung a sign on the door advising the general public that the store was closed. *Byrne Aff. ¶16, Ex. H, Resp. Notice to Admit 6-9, 12, 15, 16, 19, and 28; Lilly Aff. ¶6.* There were no sales or repairs to jewelry at the subject premises between May 14, 2016 and December 18, 2016. *Byrne Aff. ¶16, Ex. H, Resp. to Notice to Admit 13-14.* There was no jewelry in the Manchester, Vermont location as of October 1, 2016. *Byrne Aff. ¶8, Ex. E, Blesser Tr., 31.* However, there were some empty display cases and a jewelry steamer at the Manchester Vermont location at the time of the occurrence of the reported damage. *Byrne Aff. ¶8, Ex. E, Blesser Tr., 33.* The building also had heat, water, and security cameras. *Byrne Aff. ¶8, Ex. E, Blesser Tr., 30-36.* Blesser testified that he visited the store twice a month, and a real estate broker also visited regularly. *Byrne Aff. ¶8, Ex. E, Blesser Tr., 30-36.* The Manchester premises did not have tenants. *Byrne Aff. ¶16, Ex. H, Resp. Notice to Admit 17-18.*

Plaintiff admitted that the premises sustained water damage. *Byrne Aff. ¶16, Ex. H, Resp. Notice to Admit 10, 11, and 20; Byrne Aff. ¶8, Ex. E, Blesser Tr.,38, 39, 49; Petraccione Aff. ¶17.* He also admitted that the pipes broke, as a result of a faulty pressure switch on the furnace. *Byrne Aff. ¶8, Ex. E, Blesser Tr.,35, 49; DeGroff Aff. ¶10.* Moreover, the bottom of the meter had blown out. *Petraccione Aff. ¶17.*

D. AFFIDAVITS IN EVIDENCE

1. **John Lilly, Colonial Adjustment, Inc. (Defendants)**

John Lilly ("Lilly") is a senior property adjuster employed by Colonial Adjustment, Inc., that was hired by Defendants to independently investigate the reported loss. *Lilly Aff.*

¶¶*1-2*; *Byrne Aff. ¶12; Donahue Aff. ¶4, Ex. B, Donahue Tr., p. 44.* Lilly reported that the loss was caused by water damage throughout the subject premises. *Lilly Aff.* ¶7. He identified that the type of loss was "freezing/pipe bursting." *Lilly Aff. ¶¶1,2, 6, Ex. A.* Lilly detailed that the main line to the building froze and burst below the shut-off valve to the building just inside the front entry-way, causing water damage throughout the building. *Id.* Lilly detailed in his report that the "water damage spread from the front entry-way into the rest of the building before the loss was discovered." *Id.* This included damages to the drywall, base, insulation, and flooring. *Lilly Aff. ¶6, Ex. A.* Lilly observed that there was a sign on the premises indicating that it had been closed since May 4, 2016. *Lilly Aff.* ¶6. Blesser also confirmed by telephone conversation that the premises were vacant. *Id.*

2. **Kerry Donahue, Commercial Property Adjuster (Defendants)**

Kerry Donahue ("Donahue") is a commercial property adjuster employed by Massachusetts Bay Insurance Company. *Donahue Aff.,* ¶1. On December 19, 2016, Donahue spoke with Ray Blesser who advised her that he sent an HVAC technician to the premises to repair the furnace and that the technician must have forgotten to shut off the water to the premises. *Donahue Aff.,* ¶9. Blesser told her that a pipe broke and sprayed water "everywhere." *Id.*[3] Blesser also advised her that he sent Servpro to remediate. *Id.* Donahue spoke to Servpro who told her that there was water damage to the carpeting, that water was starting to wick up the walls, that water damaged the showcases in the showroom, and that the flooring had been damaged. *Donahue Aff.,* ¶*10.*

3. William R. DeGroff, 21st Century Mechanical (Plaintiff)

William DeGroff is the president of 21st Century Mechanical, whose business is HVAC and plumbing contracting. *DeGroff Aff.* ¶2. Blesser contacted DeGroff on December 16,

[3] Notably, this finding was contradicted by the Petraccione Affidavit, where it stated that "the bottom of the meter ...had already fractured by the time DeGroff arrived." *Petraccione Aff.*, ¶20. And, that it was hidden behind sheetrock. *Id.*

2016, and informed him there was no heat at the premises. *DeGroff Aff.* ¶*10*. The furnace's diagnostic code detailed that the pressure switch was not working. *Id.* DeGroff explained that a pressure switch is a safety feature that ensures there is a clear flue through which exhaust systems can vent. *DeGroff Aff.* ¶*8*. When the pressure switch is working properly it allows the gas valve and ignitor to light the furnace. *DeGroff Aff.* ¶*9*. When it fails, the gas valve or the ignitor will not be able to activate the furnace. *Id*. The furnace will not work if the pressure switch malfunctions. *Id*. DeGroff replaced the pressure switch and thawed out the furnace. *DeGroff Aff.* ¶*10*. At that visit, he noted the hot water heater and in-line filter, had frozen and split. *Id*. DeGroff noticed that water was coming through the main floor ceiling and he shut off the valve to prevent any more water from leaking into the building. *DeGroff Aff.* ¶*11*. He had to apply heat to the valve and thaw it first. *DeGroff Aff.* ¶*12*. When DeGroff returned to the property on December 19, 2016, the furnace was still working, but water had flooded the property. *DeGroff Aff.* ¶*15*. DeGroff opined that the failed pressure switch on the furnace caused the furnace to not function, allowing the building and pipes to freeze, and the building to be damaged. *DeGroff Aff.* ¶*16*.

4. <u>Pasquale A. Petraccione, Louis Petraccione & Sons, Inc. (Plaintiff)</u>

Pasquale A. Petraccione ("Petraccione"), is President of Louis Petraccione & Sons, Inc., a commercial plumbing company. *Petraccione Aff.* ¶*2*. Petraccione was asked to investigate and opine on the property loss at the premises. *Petraccione Aff.* ¶*4*. Petraccione conducted his inspection on October 3, 2019. *Petraccione Aff.* ¶*8*. He took several photographs of where water entered and flooded the building. *Id.* To the left of the front door is a closed utility door, and to the left of that is an area of removed sheetrock. *Petraccione Aff.* ¶*9*. Exhibit 2 to Petraccione's Affidavit is a picture of the inside of the utility door. *Petraccione Aff.* ¶*10, Ex. 2*. In the lower right-hand corner of the photo is the water metering device. *Petraccione Aff.* ¶*11*. This is the entry point of the water that resulted in the flooding of the main floor of the premises. *Id.* Petraccione's Affidavit then

goes into detail about how this water metering device was the main entry point of the water. *Petraccione Aff.* ¶¶*12-17.* This includes a description of how the bottom of the meter is designed to rupture in circumstances of excess pressure, including freezing, in order to protect the copper pipes above it from being damaged or destroyed. *Petraccione Aff.* ¶*15.* Petraccione confirmed that the meter had blown out, that the shut off valves were turned off, and that there was a substantial amount of water damage to the floors and walls. *Petraccione Aff.* ¶*17.* Petraccione detailed that there is no dispute that the ruptured water meter was where the water came into the building and flooded the main floor. *Petraccione Aff.* ¶*18.* He noted that Servpro took photos and labeled the meter as the "cause of loss." *Id., Ex. 5, photo 7.*

Petraccione opined that the bottom of the meter had ruptured by the time that DeGroff arrived on December 16, 2016. *Petraccione Aff.* ¶*20.* Because the water in the pipes was frozen no water had flooded the building. *Id.* When the heating system was reactivated, the frozen pipes thawed and the resulting water caused damage to the building. *Id.* When DeGroff shut off the meter, he was unable to see the blown-out bottom of the meter because it was covered by sheetrock. *Id.* Petraccione further opined that had the pressure switch not failed, then the furnace would not have failed, and the pipes would not have frozen, and the water meter would not have frozen, and the resulting water would not have run through the ruptured meter when the pipes were then unfrozen (after DeGroff re-ignited the system). *Petraccione Aff.* ¶*21.*

PROCEDURAL SUMMARY

The Summons and Complaint for a Declaratory Judgment was filed on May 29, 2018. *Byrne Aff.* ¶*4, Ex. A.* On July 13, 2018, Defendants filed a petition for removal of this action to the United States District Court. *Byrne Aff.* ¶*5, Ex. B.* An Answer was filed on July 17, 2018, when the action was in federal court. *Byrne Aff.* ¶*6, Ex. C.* The parties stipulated to remand the action on August 18, 2018. *Byrne Aff.* ¶*7, Ex. D.* Plaintiff Ray

Blesser appeared for deposition on September 30, 2019. *Byrne Aff.* ¶8, *Ex. E*. The Notice of Motion and affidavits in support of the Motion for Summary Judgment were served on January 16, 2020. The Affidavits in Opposition were served on February 27, 2010. The Notice of Cross-Motion and Affidavits in support of the Cross-Motion for Summary Judgment were also served on February 27, 2010. Oral argument was heard before the Honorable Michael R. Cuevas on March 6, 2020.

THE LAW AND DISCUSSION

A. STANDARD OF LAW

It is well-settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See*, *Sillman v. Twentieth Century-Fox Film Corp*., 3 N.Y.2d 395 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Bhatti v. Roche*, 140 A.D.2d 660 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant' s favor. *See*, *Friends of Animals, Inc., v. Associated Fur Mfrs., Inc*., 46 N.Y.2d 1065 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See*, CPLR § 3212 (b); *Olan v. Farrell Lines, Inc*., 64 N.Y.2d 1092 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See*, *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). However, If the facts are not disputed, and the only issue is one of law, then the Court may resolve the summary judgment issue based upon the applicable

law. O'Hara v. DelBello, 47 N.Y. 2d 363 (1979), *Mallad Constr. Corp. v. County Fed. S&L Ass'n*, 32 N.Y. 2d 285 (1973), *Wilner v. Allstate Ins. Co., 2011 N.Y. Misc. LEXIS 1424 (Nassau Cty. Sup. Ct. 2011).* The *Wilner* action involved an alleged breach of a homeowner's insurance policy. *Id.* Both the plaintiff and the defendant brought summary judgment by separate motion to have the Court determine whether plaintiffs were entitled to insurance coverage for property damage arising out of a storm. *Id.* All of the material facts were undisputed. *Id.* Plaintiffs filed a summons and complaint asserting that the destruction of their retaining wall was a covered loss under the terms of the policy, defendants denied the loss was covered. *Wilner, supra, 2011 N.Y. Misc. LEXIS, at 1424.* Defendants argued that a policy exclusion applied. *Id.* The court detailed that an insurer seeking to deny a claim on the basis of a policy exclusion bears the burden of proof regarding the application of the exclusion. *Id.* And, that the "inquiry is guided by the 'reasonable expectation and purpose of the ordinary business (person) when making an ordinary business contract." *Id.* In *Wilner*, the only evidence of the objective intent of the contracting parties was the policy itself. *Wilner, supra, 2011 N.Y. Misc. LEXIS, at 1424.* Where the essential facts are agreed upon, only the questions of law are left to be determined. *Id.*

B. THE VACANCY CLAUSE APPLIES TO BAR THE CLAIM FOR DAMAGES.

In contract law, as in tort cases, questions of proximate cause, including intervening cause "should generally be resolved by the fact-finder." *NAF Holdings, LLC v. Li & Fung (Trading) Limited*, 2016 U.S. Dist. LEXIS 71493 (S.D.N.Y. 2016); *quoting Voss v. Netherlands, Ins. Co.*, 22 N.Y. 3d 728, 737 (2014); *see also*, *Home Equity Mtge. Trust Series 2006-1 v. DLJ Mtge. Capital, Inc.*, 2019 N.Y. Misc. LEXIS 18 (Sup. Ct. NY County 2012). Here, where all the material facts are agreed upon, the question is actually whether the insurance company was required to look any further than the "direct" cause of the damage, i.e. the water. This is a question of law, properly left to the Court to decide.

In *Album Realty Corp.*, pipes burst due to freezing temperatures, specifically a frozen sprinkler head. *Album Realty Corp. v. American Home Assurance Co.*, 80 N.Y. 2d 1008 (1992). The builder's risk policy provided comprehensive coverage insuring "all risk of direct physical loss of or damage to the property insured from any external cause." *Id.* The policy expressly excluded from coverage loss or damage: (1) caused by or resulting from ...extremes in temperature; (2) caused by freezing. *Id.* The Court of Appeals determined that the damages were from water that occurred from the freezing and rupturing of the sprinkler head. *Id.* It explained that "[a] reasonable business person would conclude that plaintiff's loss was caused by water damage and would look no further for alternate causes. *Album, supra,* 80 N.Y. 2d, at 1008. Only the most direct and obvious cause should be looked to for purposes of the exclusionary cause." *Id.* The Court detailed that "[a] causation inquiry does not trace events back to their metaphysical beginnings." *Id.* The inquiry ends at the direct cause. *Id.; see also, Home Ins. Co. v. American Ins. Co., 147 A.D.2d 353 (1st Dept. 1989), Kennel Delites, Inc. v. T.L.S. N.Y. City Real Estate, LLC, 49 A.D. 3d 302 (1st Dept. 2008), Wilner, supra, 2011 N.Y. Misc. LEXIS, at 1424.*

Plaintiff argues that "water damage" is not a cause, but is the result of an event, cause, or occurrence." This is the "but for"-"proximate cause" analysis, i.e., had the pressure switch not failed, the furnace would not have shut off, the pipes and system components would not have frozen and become damaged and the loss would not have occurred. However, under the law, and the language of the exclusion in the insurance policy at issue, the failure of the pressure switch ultimately resulting in the water damage is too attenuated and not a direct cause of the damage. The direct cause of the damage was clearly water, as the individuals investigating and providing affidavits (Lilly, Donahue, Petraccione, and DeGroff) all agree. . The policy definition of "water damage", which is specifically excluded in the case of a vacant building (as clearly was the case here) states "water damage" means "accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of any part of a system or appliance (other than a

sump system including its related equipment and parts) containing water or steam." Here, part of the water supply system apparently broke apart causing the accidental discharge of water. The Court of Appeals unequivocally states that there is no reason to look any further than that when applying the exclusionary language of the contract to the loss.[4]

C. WHETHER THE TERMS OF THE CONTRACT, INCLUDING VACANCY CLAUSE, ARE AMBIGUOUS AND UNENFORCEABLE. OR, AMBIGUOUS ENOUGH TO CREATE A TRIABLE ISSUE OF FACT TO DEFEAT DEFENDANT'S SUMMARY JUDGMENT MOTION.

The terms of the contract, including the vacancy clause, are not ambiguous and unenforceable, or ambiguous enough to create a triable issue of fact to defeat Defendant's Summary Judgment Motion.[5] Plaintiff's attempt to create a triable issue of fact to defeat Defendant's summary judgment motion by arguing that the term "water damage" is too ambiguous, is unavailing. The cases relied upon by Plaintiff in support of this argument, including, but not limited to: *United Capital Corp. v. Travelers Indemnity Company of Illinois*, and *MDW Enterprises, Inc., v. CNA Insurance Company, et al.*, refer to a different term contained within the exclusionary clause, other than the direct cause of the alleged damage. *United Capitol Corp. v. Travelers Indemnity Company of Illinois*, 237 F. Supp. 2d 270 (U.S.D.C. Eastern Dist. 2002), *MDW Enterprises, Inc., v. CNA Insurance Company, et al.*, 4 A.D. 3d 338 (2d Dept. 2004). For example, in *United Capital* and *MDW* the courts were faced with determining whether arson fire came within the vandalism exclusion under the vacancy clause. *Id.* The courts found that the term vandalism was too ambiguous to decide whether arson fire caused by trespassers fell into this exclusion. *Id.* Here, water damage was the unequivocal direct cause of the

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[4] Plaintiff's argument that the vacancy provision of the policy is not an exclusion, but a condition does not change the result. "The standard fire policy lists a number of matters as 'conditions suspending or restricting insurance' These items are, however, somewhat akin to exclusions, since the insurer generally bears the burden of proving them." *1 New Appleman New York Insurance Law § 13.03* (2019). The terms often are used interchangeably, even in the referenced treatise.

[5] Ambiguities are to be determined in favor of the insured. *Castillo v. Prince Plaza, LLC* (2d Dept. 2018).

damage and this item is specifically listed as an excluded coverage under the vacancy clause and clearly defined in the policy.

While from the undisputed facts it appears that Plaintiff took reasonable and timely steps in an effort to prevent any damage to the premises, the at-issue policy did not contain a provision that the vacancy condition would not apply if the insured exercised reasonable care to maintain heat, shut off the water supply or drain the system so no triable issue of fact resulted therefrom. See, *Billitier v. Merrimack Mut. Fire Ins. Co.*, 777 F. Supp. 2d 488, 491-492 (W.D.N.Y. 2011).

THE COURT'S RULING

Based upon the foregoing, it is hereby

ORDERED, that to the extent, if any, that arguments propounded by any party have not been specifically addressed herein, such arguments have nonetheless been fully considered by this Court and are deemed to be without merit.

ORDERED, that the Summary Judgment Motion by Defendants The Hanover Insurance Group, Inc., and Massachusetts Bay Insurance Company pursuant to CPLR §3212 is GRANTED, Plaintiff Northeastern Fine Jewelry's Complaint is hereby DISMISSED with prejudice, in its entirety;

ORDERED, that Plaintiff Northeastern Fine Jewelry's Cross-Motion for Summary Judgment under CPLR §3212 is hereby denied with prejudice, in its entirety.

ORDERED, that this Decision and Order shall be the Order of this Court.

Dated: April 13, 2020
at Schenectady, New York

HON. MICHAEL R. CUEVAS
Justice of the Supreme Court

Papers Considered:

Moving Papers

Notice of Motion

Affirmation of Brendan S. Byrne, Esq.
- Exhibit A: Summons and Complaint
- Exhibit B: Petition for Removal
- Exhibit C: Answer
- Exhibit D: Stipulation for Remand
- Exhibit E: Ray Blesser Deposition Transcript
- Exhibit F : Insurance Policy
- Exhibit G : Notice to Admit
- Exhibit H : Response to Notice to Admit
- Exhibit I: Response to Interrogatories
- Exhibit J: Servepro report

Memorandum of Law

Affidavit of Kerry Donahue, Commercial Property Adjuster
- Exhibit A: Internal Log
- Exhibit B: Kerry Donahue Transcript
- Exhibit C: Denial Letter from Hanover dated 1/10/17
- Exhibit D: Denial Letter from Hanover dated 8/14/17
- Exhibit E: Letter from Friedman re denial of claim dated 2/7/18
- Exhibit F: Denial letter dated 2/23/18

Affidavit of John Lily- Senior Property Adjuster employed by Colonial Adjustment, Inc.
- Exhibit A: Report of John Lilly

Opposition Supporting Papers:

Memorandum of Law

Affidavit in Opposition from Christopher Flint, Esq.

Cross-Motion Supporting Papers:

Notice of Cross-Motion for Summary Judgment

Affidavit of Christopher Flint, Esq.

Memorandum of Law

Affidavit of Pasquale A. Petraccione, President of Louis Petraccione & Sons, Inc.
- Exhibits 1-5 – Photographs

Affidavit of William R. DeGross, President 21st Century Mechanical- HVAC Contractor
- Exhibits 1-2 Invoices