SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 24-01702
PRESENT: MONTOUR, J.P., SMITH, OGDEN, GREENWOOD, AND DELCONTE, JJ.

MANOEL C.D. ARRUDA AND LOUISE C.K. ARRUDA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT.

HURWITZ FINE P.C., BUFFALO (SCOTT D. STORM OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAMARDO LAW FIRM, PC, AUBURN (JOSEPH A. CAMARDO, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered October 3, 2024. The order denied the motion of defendant for summary judgment dismissing the complaint and granted the cross-motion of plaintiffs to compel defendant to respond to their discovery demands.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the cross-motion is denied, the motion is granted, and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action alleging that defendant breached its insurance contract with plaintiffs by failing to provide coverage beyond a limited payment of $10,000 for damage to their home when sewage backed up into their basement through a floor drain. Defendant moved for, inter alia, summary judgment dismissing the complaint, and plaintiffs cross-moved to compel defendant to respond to their discovery demands. Defendant appeals from an order that denied its motion and granted plaintiffs' cross-motion. We reverse.

We agree with defendant that plaintiffs' loss beyond $10,000 is excluded under the policy. An insurer moving for summary judgment "has the initial burden of coming forward with admissible evidence establishing that the loss was not a covered loss or that the loss was excluded from coverage" (*Blair v Allstate Indem. Co.*, 124 AD3d 1224, 1224 [4th Dept 2015]). "[T]o negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 [2003] [internal quotation

marks omitted]). Here, the policy unambiguously provided that defendant did not insure "for loss caused directly or indirectly by" water, including water which "[b]acks up through sewers or drains." The loss therefore fell within the water exclusion (*see Platek v Town of Hamburg*, 24 NY3d 688, 694 [2015]; *Lattimore Rd. Surgicenter, Inc. v Merchants Group, Inc.*, 71 AD3d 1379, 1379-1380 [4th Dept 2010]). Moreover, the policy further provided that defendant did not insure "for loss caused directly or indirectly by" earth movement, including "earth sinking, rising or shifting." A report issued by an engineer hired by plaintiffs showed that the sewage backup was caused by erosion of the soil around the sewer pipe, which caused the pipe to settle below the proper slope of the sewer line and created a permanent backup. Inasmuch as the loss was caused directly or indirectly by earth movement, that exclusion also applied (*see Valente v Utica First Ins. Co.*, 173 AD3d 1642, 1643 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]; *Cali v Merrimack Mut. Fire Ins. Co.*, 43 AD3d 415, 417 [2d Dept 2007], *lv denied* 9 NY3d 818 [2008]).

Defendant therefore met its burden of establishing that exclusions under the policy applied, precluding coverage for the loss beyond a $10,000 limited water back-up coverage under the policy, which was paid by defendant (*see Lattimore Rd. Surgicenter, Inc.*, 71 AD3d at 1380). In opposition to the motion, plaintiffs failed to raise a triable issue of fact regarding the applicability of an exception to the exclusions (*see Copacabana Realty, LLC v Fireman's Fund Ins. Co.*, 130 AD3d 771, 772 [2d Dept 2015], *lv denied* 26 NY3d 911 [2015]; *see generally Platek*, 24 NY3d at 694). Plaintiffs' reliance on the "exception to paragraph 2.d" of the policy is misplaced. The exception states that "[u]nless the loss is otherwise excluded, we cover loss to property . . . resulting from an accidental discharge or overflow of water or steam from within a . . . [s]torm drain, or water, steam or sewer pipe, off the 'residence premises.' " The exception applied only to coverage excluded by paragraph 2.d. Plaintiffs, however, did not identify any provision of paragraph 2.d that would be applicable here, and defendant did not rely on any of those provisions in denying coverage. Moreover, the exception states that it applies "[u]nless the loss is otherwise excluded" and, as explained above, the loss is excluded under the policy.

We respectfully disagree with our dissenting colleagues that Supreme Court properly denied the motion on the ground that additional discovery was needed. Plaintiffs failed to show "that facts essential to justify opposition [to the motion] may exist but cannot then be stated" (CPLR 3212 [f]; *see Newman v Regent Contr. Corp.*, 31 AD3d 1133, 1135 [4th Dept 2006]). The basis for defendant's motion was a report issued by an engineer hired by plaintiffs, which was further buttressed by the engineer's responding affidavit to the motion. Thus, defendant "accepted plaintiffs' version of the facts for the purpose of the summary judgment motion," leaving the only issue as the interpretation of the policy and its exclusions (*Kula v State Farm Fire & Cas. Co.*, 212 AD2d 16, 18-19 [4th Dept 1995], *lv dismissed in part & denied in part* 87 NY2d 953 [1996]).

In light of our determination, we need not address defendant's

remaining contentions.

All concur except OGDEN and DELCONTE, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm. Plaintiffs commenced this action alleging that defendant breached its insurance contract by failing to provide full coverage for extensive damage to their home from a raw sewage backup that was allegedly caused by a downstream blockage. Defendant now appeals from an order that denied without prejudice its motion for summary judgment dismissing the complaint, granted plaintiffs' cross-motion to compel defendant to respond to plaintiffs' outstanding discovery demands, and granted plaintiffs' "request for further discovery pursuant to CPLR [ ] 3212 (f)." Although the order purports to deny defendant's motion on the ground that "[d]efendant . . . failed to meet its burden of demonstrating the absence of material questions of fact," it is clear to us that Supreme Court, in effect, denied defendant's motion pursuant to CPLR 3212 (f).

In our view, the court properly denied the motion for summary judgment as premature because plaintiffs made the requisite evidentiary showing to support the conclusion that facts essential to justify opposition may exist but could not then be stated (*see Beck v City of Niagara Falls*, 169 AD3d 1528, 1529 [4th Dept 2019], *amended on rearg on other grounds* 171 AD3d 1573 [4th Dept 2019]; *cf. Feldmeier v Feldmeier Equip., Inc.*, 164 AD3d 1093, 1097 [4th Dept 2018]; *Resetarits Constr. Corp. v Elizabeth Pierce Olmstead, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1456 [4th Dept 2014]). Specifically, plaintiffs' submissions in response to defendant's motion included an expert affidavit from an engineer, who opined that the "damage caused to the basement was a discharge from a defective sewer pipe that [wa]s located off the residential premises." Inasmuch as defendant has, as noted by the majority, "accepted plaintiffs' version of the facts for the purpose of the summary judgment motion" (*Kula v State Farm Fire & Cas. Co.*, 212 AD2d 16, 18-19 [4th Dept 1995], *lv dismissed in part & denied in part* 87 NY2d 953 [1996]), the engineer's opinion establishes for purposes of the motion that the damage to the basement was not excluded from coverage under defendant's insurance policy. Plaintiffs have established that evidence regarding both the specific cause of the sewage backup and the specific location of an alleged blockage could be obtained through further discovery and thus that "facts essential to oppose the motion were in [the movant's] exclusive knowledge and possession and could be obtained by discovery" (*Resetarits Constr. Corp.*, 118 AD3d at 1456 [internal quotation marks omitted]). We would therefore conclude that the court properly exercised its discretion pursuant to CPLR 3212 (f) in denying, without prejudice, defendant's motion seeking summary judgment dismissing the complaint (*see Fellows v County of Onondaga*, 2 AD3d 1462, 1462 [4th Dept 2003]; *Freier v Amax, Inc.*, 217 AD2d 981, 981 [4th Dept 1995]; *cf. R.C.S. Farmers Mkts. Corp. v Great Am. Ins.*

Co., 56 NY2d 918, 920 [1982]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court