

**11 Essex Street Corp. v Tower Insurance Company  
of New York**

2005 NY Slip Op 30068(U)

November 22, 2005

Supreme Court, New York County

Docket Number: 0600176/1762

Judge: Emily Jane Goodman

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

**EMILY JANE GOODMAN**

PRESENT.

PART 17

0600176/2004

11 ESSEX STREET CORP.

VS

TOWER INS. CO. OF NY

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

SEQ 3

SUMMARY JUDGMENT

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*and cross motion is decided in accordance with the attached*

*and cross motion is decided in accordance with the attached*

**FILED**

DEC 01 2005

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/22/05

*[Signature]*  
\_\_\_\_\_  
**EMILY JANE GOODMAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 17

-----X  
11 ESSEX STREET CORP.,

Plaintiff,

-against-

Index No. 600176/2004

TOWER INSURANCE COMPANY OF NEW YORK,

Defendant.

-----X  
EMILY JANE GOODMAN, J.S.C.:

**FILED**  
DEC 01 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action, plaintiff 11 Essex Street Corp. seeks to recover for property damage to its building and for loss of business income under its insurance policy with defendant Tower Insurance Company of New York. Plaintiff's building allegedly suffered extensive physical damage on February 12, 2002, as a result of excavation and demolition at an adjacent construction project at 7-9 Essex Street, New York, New York. Plaintiff alleges that large amounts of earth and bedrock were removed from the adjacent property without adequate precautionary measures to prevent damage to neighboring land and structures. Defendant has denied coverage, invoking several policy exclusions.

Defendant now moves for summary judgment dismissing the complaint based on a policy exclusion for "negligent/faulty workmanship." Plaintiff cross-moves for summary judgment in its favor for breach of contract, and to strike defendant's affirmative defenses.

**DISCUSSION**

The standards for summary judgment are well settled.

"[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.”

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]).

#### Defendant’s Motion for Summary Judgment

Defendant argues that the damage to plaintiff’s building falls within the policy’s “faulty workmanship” exclusion because plaintiff is alleging that negligent construction at the adjacent project site caused damage to its building. Plaintiff argues that the exclusion applies only to property damage caused by its own faulty work. According to plaintiff, any contrary interpretation would violate Insurance Law § 3404 (f) (1) (A), which provides for a minimum scope of coverage.<sup>1</sup> In any event, plaintiff argues that the exclusion is ambiguous, and that the applicability of the exclusion cannot be determined now, because a jury has yet to find that the construction work at the adjacent site was negligently performed.

“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. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983][internal citations omitted]). “[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. It follows that policy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer” (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377,

---

<sup>1</sup>Defendant points out that this provision only applies to fire insurance policies.

383 [2003][internal citations and quotation marks omitted]).

The “faulty workmanship” exclusion states, in pertinent part:

“B. Exclusions

\* \* \*

3. We will not pay for loss or damage caused by or resulting from any of the following B.3.a. through B.3.c.

\* \* \*

c. Negligent Work

Faulty, inadequate or defective:

\* \* \*

(2) Design, specifications, workmanship, repair, construction, renovation or remodeling, grading, compaction;

\* \* \*

of part or all of any property on or off the described premises”

(see Katz Affirm., Ex 8 [defendant’s emphasis]).

In its moving papers, defendant cited no reported cases interpreting this exclusion, and the court did not find any reported New York cases addressing this issue. Courts in other states interpreting similarly worded exclusions have reached different conclusions (*compare El Rincon Supportive Servs. Organization, Inc. v First Non-Profit Mut. Ins. Co.*, 346 Ill App 3d 96, 106 [2004][exclusion applicable to damage from excavation on adjacent property] with *Jussim v Massachusetts Bay Ins. Co.*, 33 Mass App Ct 235, 237-238 [1992], *affd* 415 Mass 24, 30 [1993][exclusion did not apply to oil spill on adjacent property]).

Following the principles of construction, this court is persuaded that the faulty workmanship exclusion applies to situations only “where the insured or someone authorized by the insured contracts for alterations to the property and is dissatisfied with the quality of the performance under that contract” (*Husband v Lafayette Ins. Co.*, 635 So 2d 309, 311 [La App

1994]). Defendant itself cited a treatise that indicates that “negligent work” refers only to the insured’s contractual undertakings, because “insurance carriers seek to avoid insuring, or guaranteeing, the quality of the insured’s contractual undertakings” (Cozen, *Insuring Real Property* § 2.04 [19] [a] [2004]). Otherwise, as the court noted in *Jussim*, “[s]uch an interpretation would leave the insurance policy practically worthless” (*Jussim*, 33 Mass App at 239). Contrary to defendant’s argument, such an interpretation does not render the “on or off the premises” language superfluous. Work that is done off the premises of the insured’s building can nevertheless become part of the property, such as woodwork or carpentry that is done off-site but is brought later to the insured’s building.

The cases that defendant cited in its reply papers are inapposite, for they addressed the issue of whether the exclusion applied to the faulty workmanship of a subcontractor on the insured’s property. Therefore, the faulty workmanship exclusion does not apply to the work performed on the adjacent property. Defendant’s motion for summary judgment dismissing the action is denied.

Because defendant also raised the faulty workmanship exclusion as the fifth affirmative defense, the court grants plaintiff reverse summary judgment striking this defense (*see* CPLR 3212 [b]).

As to plaintiff’s alleged business income losses, defendant denies coverage on the grounds that the loss was not covered as a result of the “faulty workmanship” exclusion and because the plaintiff did not sustain a “necessary suspension” of its business. The Court has already determined that the “faulty workmanship” exclusion does not apply. As to the latter ground, the policy states, in pertinent part:

“5. Additional Coverages.

\* \* \*

f. Business Income

(1) Business Income

We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your ‘operations’ during the ‘period of restoration.’ The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

We will only pay for loss of Business Income that you sustain during the ‘period of restoration’ and that occurs within 12 consecutive months after the date of direct physical loss or damage.”

(Katz Affirm., Ex 8 [defendant’s emphasis]). To show that plaintiff’s business was not suspended, defendant relies on excerpts of plaintiff’s testimony to show that plaintiff was able to collect rent from tenants at all times. Although the building leaned, plaintiff testified (by its owner, Sion Misrahi) that tenants remained in the building (*see id.*, Ex 9, at 46). In opposition, plaintiff maintains that it was unable to rent out nine units, at a loss of \$9,231 each month (Greene Aff. ¶¶ 7-10).

Plaintiff fails to raise an issue of fact as to whether it suffered a “necessary suspension” of its operations. “[T]he language of the subject policy clearly and unambiguously provides that for business interruption coverage to be triggered, there must be a ‘necessary suspension,’ i.e., a total interruption or cessation” (*54th Street Ltd. Partners, L.P. v Fidelity and Guar. Ins. Co.*, 306 AD2d 67, 67 [1<sup>st</sup> Dept 2003][citations omitted]). Here, because other tenants remained in the building while the other nine units could not be rented, plaintiff suffered only a partial cessation of operations (*see Forestview The Beautiful, Inc. v All Nation Ins. Co.*, 2005 Minn App LEXIS 773, 2005 WL 2649467 [Minn App Ct, Oct. 11, 2005][partial cessation when severe storm damaged four of 20 cabins]; *see Royal Indem. Ins. Co. v Mikob Properties, Inc.*, 940 F Supp 155,

160 [SD Tex 1996][fire destroying one of three adjacent apartment buildings in an integrated complex did not cause a suspension of operations, regardless of a decrease in occupancy]).

Therefore, this branch of defendant's motion for summary judgment is granted. Plaintiff's second cause of action, for loss of business income, is dismissed.

#### Plaintiff's Cross Motion for Summary Judgment

Plaintiff cross-moves for summary judgment in its favor on its first cause of action, for breach of contract, and to strike defendant's first, second, third, fourth, and sixth affirmative defenses. The six affirmative defenses are various policy exclusions that defendant has invoked to disclaim coverage, and defendant has agreed to withdraw its first and sixth affirmative defenses (*see* Reply Mem., at 18 n 10).

Plaintiff does not meet its prima facie burden for summary judgment on the first cause of action. Plaintiff contends that the property damage was covered under the policy as damage resulting from a "collapse," but plaintiff's moving papers only made a passing reference to this coverage in a footnote. The arguments and analysis of the policy's coverage were improperly raised in plaintiff's reply, which cannot be used to remedy deficiencies in plaintiff's prima facie showing (*see Migdol v City of New York*, 291 AD2d 201, 201 [1<sup>st</sup> Dept 2002]). Moreover, as discussed below, plaintiff did not establish that all of the policy exclusions that defendant invoked were inapplicable.

Defendant's second affirmative defense is based on the policy exclusion for "earth movement." That exclusion states, in pertinent part:

b. Earth Movement

- (1) Any earth movement (other than sinkhole collapse), such as earthquake,

landslide, mine subsidence or earth sinking, rising or shifting. But if earth movement results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.

On its face, the language of the “earth movement” exclusion is silent as to whether it refers to earth movement that is caused only by natural phenomena, as the examples might suggest. As plaintiff points out, the “earth movement” exclusion traditionally covered instances of earth movement from natural phenomena, which is not the case here (*Burack v Tower Ins. Co. of New York*, 12 AD3d 167, 167 [1<sup>st</sup> Dept 2004]). Defendant argues that this exclusion absolves the insurer from any liability regardless of the cause or type of earth movement, citing *Sheehan v State Farm Fire & Cas. Co.* (239 AD2d 486 [2d Dept 1997]) and *Kula v State Farm Fire & Cas. Co.* (212 AD2d 16 [4<sup>th</sup> Dept 1995]).

The State Farm cases that defendant cited are inapposite. Those policies treated earth movement as an excluded event in itself, and stated that the policy would not insure this type of loss “regardless of the cause of the excluded event” (*see Sheehan*, 239 AD2d at 487). Courts reasoned that the “regardless of the cause” language thereby embraced earth movement resulting from both human events and natural phenomena. Unlike the State Farm policies, defendant’s policy regards earth movement as a cause in itself, not an excluded event “regardless of cause.” Thus, the language of the policy is ambiguous as to whether it was meant to depart from the traditional interpretation of this exclusion. Construing the ambiguity in favor of the insured, this court holds that the earth movement exclusion does not apply here, and the second affirmative defense is stricken.

Defendant’s third affirmative defense is based on the policy exclusion for settling, cracking, shrinking or expansion. That exclusion states, in pertinent part:

“2. We will not pay for the loss or damage caused by or resulting from any of the following:

\* \* \*

k. Other Types Of Loss

\* \* \*

4) Settling, cracking, sinking or expansion

\* \* \*

But if an excluded cause of loss that is listed in B.2.k.(1) through B.2.k.(7) results in a ‘specified cause of loss’ or building glass breakage, we will pay for the loss or damage caused by that ‘specified cause of loss’ or building glass breakage”

(Katz Affirm., Ex 8).

Plaintiff contends that the exclusion applies only to damage occurring to the insured premises immediately following its construction, citing *Barash v Insurance Company of North America* (114 Misc 2d 325, 327-328 [Sup Ct, Nassau County 1982]). Alternatively, plaintiff alleges that the building suffers from major structural defects amounting to a collapse, rather than mere settling or cracking. In opposition, defendant argues that the building did not collapse because it has remained standing for two and a half years after the incident, without any structural repairs. Defendant also cites a letter from the Department of Buildings, which stated on April 29, 2004 that the building was not in immediate danger of collapse (Katz Affirm., Ex 14).

The reasoning of other Supreme Court decisions interpreting this exclusion persuades this court that the exclusion does not apply. In *Barash*, the court stated that,

“[a]s applied to houses, settling has a different connotation, that of a building initially coming to rest after construction. . . . The implication given to the average insurance buyer is that what is excluded is the normal, gradual readjustment of the building materials when it occurs in foundations, walls, floors or ceilings”

*Barash*, 114 Misc 2d at 327-328). In *Holy Angels Academy v Hartford Ins. Group*, the court

concluded that “cracking,” when read in context with the surrounding words such as “wear and tear,” was limited in application to natural phenomena (*Holy Angels* 127 Misc 2d 1024, 1025 [Sup Ct, Erie County 1985]; accord *Ariston Airline & Catering Supply Co. Inc. v Forbes*, 211 NJ Super 472, 485 [1986][contrasting cracking as the result of an external force and cracking due to the “natural and expected settling” of the building]). Similarly here, the surrounding words of the policy include “wear and tear.” Construing ambiguity against Defendant, the Court agrees with the referenced cases and holds that the exclusion applies to natural phenomena.

Therefore, the third affirmative defense of the answer is stricken.

As to the fourth affirmative defense, based on the “acts and decisions” exclusion, plaintiff did not meet its prima facie burden. Plaintiff relegated discussion of this exclusion to a footnote, arguing that this exclusion, like the negligent/faulty workmanship exclusion, was unenforceable due to ambiguity. Plaintiff’s only argument was that the policy could have been better drafted to reflect the insurer’s intent to refer to “the acts and decisions” of third parties. However, the exclusion itself refers to “acts or decisions, including, the failure to act or decide, of any person, group, organization or permanent body” (emphasis added). Plaintiff does not show how the “acts and decision” exclusion is susceptible of more than one reasonable interpretation.

Accordingly, it is hereby

ORDERED that defendant’s motion for summary judgment is granted only to the extent that the second cause of action is dismissed, and the motion is otherwise denied; and it is further


ORDERED that plaintiff’s cross motion for summary judgment is granted to the extent that the first, second, third, fifth, and sixth affirmative defenses of the answer are stricken, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

**This Constitutes the Decision and Order of the Court.**

Dated: November 22, 2005

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
DEC 01 2005  
NEW YORK  
COUNTY CLERK'S OFFICE