

**Park City Estates Tenants Corp. v Gulf Insurance
Co.**

2005 NY Slip Op 30218(U)

November 28, 2005

Supreme Court, New York County

Docket Number: 0603660/2003

Judge: Herman Cahn

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

PRESENT: HERMAN CAIN
Justice

PART 49

Park City

INDEX NO. 603660/03

MOTION DATE 7/5/05

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

Helf Inc.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

FILED
NOV 30 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/28/05 He Col
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: IAS PART 27

-----X
PARK CITY ESTATES TENANTS CORP.,
Plaintiff,

-against-

Index No.
603660/03

GULF INSURANCE CO.,
Defendant.
-----X

CAHN, J.:

Plaintiff Park City Estates Tenants Corporation, a cooperative corporation, brings this action to recover on an all-risk commercial property and general liability insurance policy issued by defendant Gulf Insurance Company, covering several of its residential apartment buildings located in Rego Park, New York.

Gulf moves for summary judgment dismissing the complaint. Park City cross-moves for partial summary judgment on the issue of liability.

BACKGROUND

Park City commenced this action to recover losses resulting from damage to the gas pipe distribution system at one of its buildings, located at 61-45 98th Street in Rego Park, New York (the Premises). Briefly, on November 22, 2002, the occupant of apartment 2B, in the process of performing renovation work, pierced a two-inch gas line while attempting to remove a three inch concrete step, in which the pipe was embedded (Plaintiff's Rule 19-a Statement, ¶ 2). The accident was reported to Park City's management, which immediately contacted the Fire

Department (id., ¶ 3). The Fire Department then called Keyspan Energy, which came to the premises and locked the gas valve (id.). The repairs to the gas line in the apartment were completed by December 2, 2002 (id.).

The Premises were covered by an all-risk commercial property and general liability policy (policy number 03-GAK-000711-0/000) issued by Gulf (see Gigante Affirm., Exh. 3). The policy provided coverage, subject to a \$5,000.00 deductible, for all risks of direct physical loss of, or damage to, the Premises caused by a covered cause of loss, unless specifically excluded by the policy. The insurance adjuster assigned to handle Park City's claim estimated the cost to repair the broken gas line to be approximately \$2,500.00, well within the Policy's \$5000.00 deductible (see Calabro Aff., Exh. 2).

However, before gas service could be restored to the Premises, the entire gas pipe system had to be subjected to high-pressure integrity testing (Plaintiff's Rule 19-a Statement, ¶ 3), in accordance with New York City's Administrative Code §§ 27-921(a) and 27-922(d) (Defendant's Rule 19-a Statement, ¶ 6). At the direction of Keyspan, New York Plumbing, a company hired by Park City to perform the repair, began to pressure test the gas lines in the building (Plaintiff's Rule 19-a Statement, ¶ 4). A significant number of gas risers failed this integrity testing, resulting in extensive and expensive repairs and replacement of

pipes before the system could pass the tests (id.; Defendant's Rule 19-a Statement, ¶ 7). The gas distribution system was not fully restored until December 15, 2002 (Plaintiff's Rule 19-a Statement, ¶ 4). Park City submitted an insurance claim which included these additional items, in the sum of \$662,963.23 (id., ¶¶ 4 and 5).

Gulf disclaimed coverage on the ground that the costs associated with the integrity testing were excluded under the Ordinance or Law Endorsement contained in their policy (Gigante Affirm., Exh. 12).

Specifically, section C.1(a) of the policy is deleted, and replaced by the Ordinance or Law Endorsement, which excludes coverage for loss or damage caused by any "[o]rdinance or law regulating the construction, use or repair of any property. But we will pay:"

(1) For loss or damage to the undamaged portion of the building caused by enforcement of any ordinance or law that:

- (a) requires the demolition of parts of the same property not damaged by the covered cause of loss;
- (b) regulates the construction or repair of building, or establishes zoning or land use requirements at the described premises; and
- (c) is in force at the time of the loss.

(2) The cost to demolish and clear the site of undamaged parts of the property caused by enforcement of the:

- (a) building;
- (b) zoning; or

(c) land use
ordinance or law.

(3) The increased cost to repair, rebuild or construct the property caused by enforcement of:

(a) building;
(b) zoning; or
(c) land use

ordinance or law.

(See Gigante Affirm., Exh 3: Form BS 54522 [Building and Personal Property Coverage Form]) and Form BS 54529 [Ordinance or Law Endorsement]). However, the Ordinance or Law Endorsement also provides that the costs associated with mandatory integrity testing of gas pipe systems are excluded, as follows:

We will not pay under this endorsement for the cost associated with the enforcement of any ordinance or law which requires any Insured or others to test plumbing gas or other building systems for integrity or condition.

(Id. [Emphasis added]).

Gulf argues that since the costs of repairing and replacing the gas pipe system, which Park City now seeks to recover, were incurred in order to bring the gas pipe system into compliance with New York City's Administrative Code provisions requiring mandatory integrity tests, these are costs associated with enforcement of an ordinance requiring testing, and thus are excluded from coverage. Gulf now moves for summary judgment dismissing the complaint based on this exclusion, or

alternatively, on exclusions for wear and tear and/or faulty maintenance that also are included in the policy.¹

Park City argues that the ordinance or law exclusion is inapplicable here because the integrity testing would have been performed regardless, as part of proper plumbing practice. In support of this contention, Park City submits an affidavit from Gregory Quattlander, a master plumber and the President of New York Plumbing, who states that, "[e]ven where the integrity test is not made mandatory by any law and/or regulation, I would recommend it anyway, like in this case, to guarantee the integrity and safety of the system." Therefore, Park City contends that the ordinance was not the proximate cause of the resulting losses.

Park City additionally argues that the exclusions for wear and tear should not bar coverage, because courts have found such exclusions to be inapplicable where an otherwise properly functioning gas pipe system fails due to pressure testing required as a result of an otherwise covered loss (citing 375 Riverside Drive Owners, Inc. v Firemen's Ins. Co. of Washington, D.C., et al., Index No. 119594/97 [Sup Ct, NY County, Nov. 29, 1999, Schlesinger, J.], 20 East 35 Owners Corp. v Great American

¹The policy excludes loss or damage caused by, or resulting from, "wear and tear" (id., Section C [2][d]), or faulty, inadequate or defective maintenance (id., Section C [3][c]).

Ins. Co., 1996 WL 438172 [SD NY Aug. 5, 1996]). Park City argues that, since the initial puncture of the pipe was a fortuitous loss that was covered by the policy, all losses flowing from that original occurrence should be covered.

DISCUSSION

A motion for summary judgment will be granted when the movant has tendered sufficient evidence to establish entitlement to such relief as a matter of law (CPLR 3212; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). When the movant has established such entitlement, the party opposing the motion must tender proof, sufficient to raise a material question of fact (Zuckerman v City of New York, 49 NY2d 557 [1980]).

As this court finds that defendant insurer has established entitlement to relief as a matter of law, and plaintiff has failed to tender proof sufficient to indicate the existence of material issues of fact, defendant's motion for summary judgment dismissing the complaint is granted.

The New York City Administrative Code requires that once gas service to a building has been shut down due to a leak, the entire gas pipe system must pass mandatory integrity testing before gas service may be restored (see Simkowitz v Firemen's Fund Ins. Co., 5 AD3d 283 [1st Dept 2004]; St. Paul Fire and Marine Ins. Co. v 111 Tenants Corp., 314 F Supp 2^d 183 [SD NY 2003], affd 93 Fed Appx 299 [2^d Cir 2004]). Specifically,

Section 27-921(a) of the Administrative Code provides that:

Every new plumbing and gas piping system and every part of an existing system that has been altered or repaired except for minor alterations and ordinary repairs, shall be tested as hereinafter prescribed to disclose leaks and defects. ...

Section 27-922(d) further provides that:

Upon completion of the installation of a section of a gas system or of the entire gas system, and before appliances are connected thereto, the completed section or system shall be verified as to materials, and tested and proven tight ...

Section 27-922(d) additionally sets forth the specific pressure tests to be used in such testing.

Even if Park City would have performed integrity testing regardless of the Administrative Code requirement, it is undisputed that gas service could not have been restored to the Premises until the gas pipe system had passed the integrity tests mandated by the code (see Quattlander Aff., ¶¶ 8 and 10). Here, Park City has admitted that New York Plumbing began to pressure test the gas lines in the building at the direction of Keyspan (Plaintiff's Rule 19-a Statement, ¶ 4). In addition, the pressure testing overview prepared by New York Plumbing, sent to Park City, reveals that gas service was not restored until a City Inspector tested the system, and the system had passed (see Gigante Aff., Exh. 7).

As plaintiff notes, some courts have found that damages to a gas pipe system, resulting from the very same mandatory integrity

tests at issue here, are covered under an all-risk policy when a fortuitous event, as here, has damaged an otherwise functioning gas system (see e.g. 375 Riverside Drive Owners, Inc. v Firemen's Ins. Co. of Washington, D.C., et al., supra; 20 East 35 Owners Corp. v Great American Ins. Co., supra). However, none of the policies at issue in those cases included the exclusion for "the cost associated with the enforcement of any ordinance or law which requires an Insured or others to test plumbing, gas or other building systems for integrity or condition" (see Gigante Affirm., Exh 3). As Gulf notes in its memorandum of law, in a more recently decided federal case, 61 Jane Street Tenants Corp. v Great American Ins. Co. (2001 WL 40774 [SD NY Jan. 17, 2001]), in which the policy at issue did contain an exclusion identical to the one found in Gulf's policy, the federal court held that the cost of repairs needed to bring a gas pipe system into compliance with the very same Administrative Code provisions, at issue here, were excluded from coverage.

Park City argues that Gulf's reliance on 61 Jane Street is misplaced because the underlying facts in that case are not similar to those present here. Specifically, it contends that the underlying cause of loss in that action was a fire "that had no relationship to the gas system at all, whereas the case at bar involves initial damage to the gas system itself" (Giordano Affirm., ¶ 9). In any event, Park City argues that it is not

clear that the Ordinance or Law Endorsement in that action was, as a whole, identical to the endorsement at bar, and that, when read as a whole, the Ordinance or Law Endorsement in Gulf's policy is ambiguous, and could reasonably be read to apply only to the costs associated with performing the tests, and not to the costs associated with passing the tests, i.e., the costs for repair and replacement resulting from the failure of the gas risers during testing. Park City argues that since any ambiguity must be interpreted against the insurer, this endorsement cannot be used to deny coverage.

In 61 Jane Street, the gas service to the building was turned off by the Fire Department, "due to the escape and accidental lighting of natural gas" in the stove of an apartment (id., at *1). Although the fire was confined to the stove, and caused no damage to the building, "[i]n the course of controlling it, ... the Fire Department turned off the gas to the building, apparently because it could not identify which line ran to the affected apartment, and so could not effect a more limited cut-off" (id.). As here, the Administrative Code required that the entire gas distribution system be tested for leaks and defects before gas service could be restored. During that testing, numerous leaks were found in various parts of the system, requiring extensive and expensive repairs.

In denying coverage, the federal court found that the stove

fire did not damage the gas system or cause the system to fail the test, and that the Fire Department's turning off the gas did not cause damage or loss, it simply triggered the application of the building code's testing requirements, which the plaintiff's gas system was unable to pass. As Park City notes, here, on the other hand, there was damage to the gas pipe that would have been covered under the policy.

However, the evidence shows that the repair of the damaged pipe was completed quickly, at minimal cost; had the gas pipe system been up to code, the system could have been turned on promptly after testing. The additional costs of repairs to bring the system into compliance with the ordinance requiring testing were due to the system's failure to pass these tests. Here, the Ordinance or Law Endorsement specifically excludes the cost associated with the enforcement of any ordinance requiring testing.

As here, the plaintiff in 61 Jane Street also had argued that the exclusionary clause, identical to the one at issue here, was ambiguous, in that it referred only to the cost associated with the enforcement of laws requiring testing, and did not refer to the cost of making repairs necessitated to pass the test. The plaintiff additionally had argued that the ordinance itself did not require repairs, but only testing. In determining that coverage for the repairs was excluded, the federal court held

that

[t]here is no doubt that the ordinance, as intended and applied, requires that the tests be passed before gas service is permitted. While plaintiff could have elected to forego gas service rather than to make the repairs, in ordinary English usage it is quite plain that the cost of repairing the gas system in order to restore gas service that, under an applicable City regulation, will not be restored unless the system passes a test, is a "cost associated with the enforcement of any ordinance ... which requires [the] Insured ... to test [its] gas ... system[]." Taken together, the language of the original "ordinance or law" exclusion and the endorsement relating to testing gas systems make clear and unambiguous that the policy does not cover the expense of repairing a gas distribution system as a response to a statutory requirement that a gas system be tested under certain circumstances and, if it fails, that the system not be put into use.

(Id., 2001 WL 40774, *4)

This court agrees and finds that the Ordinance or Law Endorsement at issue explicitly excludes all costs associated with the "enforcement of any ordinance which requires ... test[ing]," not merely the cost of the tests themselves. Even when read in the context of the Ordinance or Law Endorsement as a whole, this exclusion cannot reasonably be read to apply only to the costs of performing the integrity tests, and not the costs that were necessarily incurred in order to pass those tests, i.e., the replacement of those parts of the gas pipe system that had failed the mandatory integrity tests. Since the repairs and replacement of the failed gas risers were required to bring the system into compliance with the ordinance requiring testing, and,

thus, were costs associated with the enforcement thereof, coverage for the cost of these repairs is excluded by this endorsement. While it is undisputed that the losses incurred by Park City to repair the initial pipe breach would have fallen within the coverage provided by the policy, those costs apparently were less than the \$5000.00 deductible. As all of the remaining costs for which Park City seeks coverage fall within the Ordinance or Law exclusion, the complaint is dismissed.

In light of this determination, the issue of whether these costs would be excluded under the "wear and tear" or faulty maintenance exclusions need not be reached.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: November 28, 2005

ENTER:



J.S.C.

FILED
NOV 30 2005
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NEW YORK