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SCANNED ON 3/21/2005

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

PRESENT: LOUIS B. YORK Justice PART 2

Seward Park Housing Corporation

- v -

Greater New York Mutual INS. Co

INDEX NO. 600059-01

MOTION DATE

MOTION SEQ. NO. 10

MOTION CAL. NO.

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 3-15-05

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST LOUIS B. YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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SEWARD PARK HOUSING CORPORATION,. Index No. **600059/01**
Plaintiff,

-against-

GREATER NEW YORK MUTUAL INSURANCE CO.,
Defendant.

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LOUIS B. YORK, J.:

In this motion, defendant moves after a verdict of over $12,000,000, alternatively, after a nine-week trial for a judgment NOV, to reduce the verdict or for a new trial. For the reasons explained infra, the motion is denied.

At the outset, the Court notes defendant egregiously broke the 30-page limit for the permissible length of briefs with its 50-page brief and the 25-page limit for motions with its 43-page affidavit in support of its motion. (See, General Rule 14a of the Rules of the Justices of NY County - Civil Branch [Non Commercial Division].) It also submitted an 11-page reply affirmation. All told, that amounts to 104 pages submitted to the Court. Of course, the Court could have allowed the length of the brief to be expanded, if it were asked. Additional pages have been authorized in the past upon request.

It is also pointed out that there was no need to attach such extensive affidavits to the Notice of Motion. Along with the exhibits introduced into evidence, over 4000 pages of transcript contained all the facts needed and should have been the sole background on which the briefs were based. Consequently, I will address the arguments raised in the parties' Memoranda of Law and will not consider the defendant's moving and reply affidavits.

Facts

The defendant, Greater New York Mutual Insurance Company, disclaimed coverage for the partial collapse of the plaintiff Seward Park Housing Corporation's one-story parking garage. The disclaimer, contained in a letter dated December 29, 2000, stated that the collapse was based on decay, deterioration, latent defects and faulty design. Plaintiff brought this lawsuit claiming that the collapse was due both from defective workmanship and materials with the retention of a high volume of water in the gardens above the roof. The lawsuit sought $19,000 in damages.

Defendant's Contentions-Court's Responses

Contention

At defendant's counsel's request, the Court separated out a number of items on the verdict sheet. Defendant argues that the amounts awarded for many of them are not covered and should be subtracted from the overall verdict. Following are those questions and answers:

4. **Set forth the amount, if any, awarded for the underground pipes, drains and the trench.**

5. **Set forth the amount of money awarded, if any, for the fences, trees, shrubs and plants built on the top roof of the garage.**

6. **Set forth the amount awarded, if any, for the roof garden and lawns ...**

9. **Set forth the amount awarded for paved surfaces, excavations and foundations.**

Response

Defendant has never argued that the garage is not covered property. Defendant claims that it is these component parts of the garage that are excluded under the insurance policy. Under the disclaimer letter, defendant never stated that such exclusions applied. It merely opined that the cause of the loss was the deteriorated state of the garage and the faulty design that caused it to collapse. The disclaimer, therefore, failed to satisfy the high degree of specificity that is required. Therefore, these matters cannot be raised at trial. The rule's purpose is to enable plaintiff, the insured, to accurately assess the validity of the claim (***General Accident Insurance Group v Cirucci*** , 46 NY2d 862, 414 NYS2d 512 [1979]; ***Shapiro Realty Co. v Agricultural Insurance Co.,*** 287 AD2d 389, 731 NYS2d 453 [1st Dept 2001]). (Disclaimer letter said plaintiff did not timely notify insurance company of a defective slab, but plaintiff sued for the covered collapse, which the disclaimer letter did not mention.) This failure alone was sufficient to defeat this defense. Added to it is the fact that these items were never asserted as an affirmative defense. So that plaintiff entered the trial without proper notice that this argument would be raised.

Of course, if the collapse was not a covered event, then the argument over whether these items should be excluded would never arise. The collapse was a covered event despite defendant's protestations to the contrary. Exclusions in insurance policies are interpreted very strictly and narrowly, while exceptions to exclusions are interpreted very liberally and expansively (See, ***Edwards v Allstate Insurance Co.***, ___ AD3d____, 2005 WL 5349 [2nd

Dept 2005]; See, also ***Atlantic Cement Co. v The Fidelity & Casualty Company of NY***, 91 AD2d 412, 459 NYS2d 425 [1st Dept 1983] app dism 59 NYS2d 161 [1983] [Table]). In the "Causes of Loss" - Special Form of the policy under "D Additional Coverage - Collapse" the plaintiff agrees to pay for loss if, as in this case, after construction is completed the collapse is caused by inter alia hidden decay and weight of rain that collects on the roof. And if one of the two causes first adverted to results, in part, in collapse, the plaintiff "will pay for the loss or damage even if use of defective materials or methods in construction, remodeling or renovation, contributes to the collapse." This exception to the exclusion of weight of precipitation on the roof, which is a partial cause of collapse establishes coverage for the collapse in this case. Under the same section (Additional Coverage-Collapse), the following losses are covered, if as has first been shown, the loss is to covered property: awnings, gutters and downsproats, yard fixtures, fences, walks, roadways and other paved surfaces. This section provides additional reasons justifying the inclusion of the items that defendant insists should be deducted from the damages award.

Contention

Defendant argues that the plaintiff failed to show with expert witnesses the cost of rebuilding the garage, and they were required to rebuild with the same materials.

Response

Testimony from Robert Lawless, an architect, Dov Kaminetsky, a renowned structural expert and Steven Danenberg, the president of Seward Park proved just that. In addition,

Mr. Rubino, a builder, specifically testified that the cost of rebuilding would amount to $7.9 million, but he excluded a number of items that the defendant argued were exclusions, but which the Court has now ruled are exceptions to the exclusions. They established that changes in the law, new improved materials and the unavailability of some materials make it impossible to use the exact same materials. They did establish that in light of such problems, they used the exact same columns, the same size slabs, although the thickness was increased and they used the same number of parking spots. The jury took account of this by awarding less in many instances than the plaintiff had asked for. That is reflected on the amount awarded for the fountain on the roof. The plaintiff sought $200,000 and the jury awarded zero. In the play area, the amount sought was $500,000 and the jury awarded $28,500.

Contention

Defendant argues that invoices were incorrectly allowed into evidence under the business records exception to the hearsay rule.

Response

Invoices and copies of checks are regularly received in evidence under the business records rule as long as a proper foundation has been laid for them (***People v Cratsley***, 86 NY2d, 629 NYS2d 992 [1995]; ***Plymouth Rock Fuel Corp. v Leucadia, Inc.***, 117 AD2d 727, 498 NYS2d 50 [2d Dept 1986]; ***Lewis v Basuk***, 55 AD2d 817, 389 NYS2d 952 [4th Dept 1976]). Defendant never claimed that a proper foundation was not laid for this

evidence.

Contention

Defendant argues that the Court mistakenly charged that the southern portion of the garage, which was ordered demolished by local authority, was covered if the northern portion was covered. The charge, claims defendant, that the ordinance or law provision of the contract, which plaintiff relies on, only applies to undamaged property. Therefore, the charge should have been that plaintiff could only recover if it could prove that the property was undamaged.

Response

The Court charged the jury that if there is coverage for the northern portion of the garage, then it must find coverage for the southern portion. The Enhanced Commercial Property Coverage Endorsement creates an exception to the exclusion of non-coverage for the undamaged portion of a covered property. Coverage B allows for the cost of repairs to demolish and clear the site of undamaged parts of the property caused by "building, zoning or land use ordinance or law." Coverage C covers the cost of rebuilding. The Court interprets this exception to mean that the undamaged portion refers to the part left standing. Therefore, the charge was not incorrect.

Contention

Defendant claims that the Court's charge was deficient because it failed to define the phrase "caused in part." In relying on ***Home Insurance Co v American Insurance***

Co., 147 AD2d 353, 337 NYS2d 537 [1st Dept 1989], defendant asserts that this Court, like the Home Insurance Co., Inc. Court, should have charged that the dominant cause of the collapse was weight of rain on the roof.

Response

In the Home Insurance case, the insurance policy stipulated that the cause of the covered peril meant the dominant cause. Here, the exception to an exclusion allows that where the collapse was caused in part by the weight of rain, it was a covered loss. If, as defendant claims, the parties meant the dominant cause, why would they say "caused in part", the meaning of which is clear on its face? The approach taken by the Court comports with accepted notions of the concept of cause in tort actions where it has long been recognized that there can be more than one cause of an accident or injuries (***Forte v Albany***, 279 NY 416, 18 NE2d 643, [1939]; ***Metal Fabrications v Solid Waste Management Systems***, 286 AD2d 603, 730 NYS2d 299 [1st Dept 2001]).

I have considered defendant's remaining arguments and find them to be without merit.

Settle Judgment.

Dated: 3/15/05

Louis B. York, J.S.C.

LOUIS B. YORK