

**TV Garage Outlet, Inc. v Insurance Co. of  
Greater N.Y.**

2007 NY Slip Op 33663(U)

October 25, 2007

Supreme Court, Kings County

Docket Number: 0037936/2006

Judge: Laura Lee Jacobson

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At an IAS Term, Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25<sup>TH</sup> day of October , 2007.

P R E S E N T:

HON. LAURA LEE JACOBSON Justice.  
-----X

TV GARAGE OUTLET, INC.,

Plaintiff,

- against -

Index No. 37936/06

INSURANCE COMPANY OF GREATER NEW YORK,

Defendant.  
-----X

The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	_____1-2, 3-4_____
Opposing Affidavits (Affirmations)_____	_____5_____
Reply Affidavits (Affirmations)_____	_____6_____
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendant Insurance Company of Greater New York moves for an order, pursuant to CPLR 3025(b), granting it leave to serve an amended verified answer to assert an additional affirmative defense. Plaintiff TV Garage Outlet, Inc. cross-moves for an order, pursuant to CPLR 3212, granting summary judgment on its breach of contract claim against defendant.

### ***Factual Background***

Plaintiff TV Garage Outlet, Inc. (plaintiff or TV Garage) is a retail clothing store located at 1905-1909 Stillwell Avenue, Brooklyn, New York (the premises). Plaintiff purchased an all-risk commercial insurance policy for the premises from defendant Insurance Company of Greater New York (defendant or GNY) (policy number 6131M09588), with effective dates August 1, 2005 to August 1, 2006 (the policy). The policy covered risks of direct physical loss or damage to the property insured unless the loss is specifically excluded in “Section B., Exclusions,” or limited in “Section C., Limitations.”

On April 23, 2006, the plaintiff sustained a property damage loss at its premises. It is undisputed that on the day in question, it was raining heavily, and that a clogged drain located on the roof of the premises backed up and overflowed causing rain water to seep into the building, thereby damaging plaintiff’s merchandise and fixtures. Shortly thereafter, the plaintiff made a claim with defendant for the property damage it sustained on April 23, 2006.

After an investigation, defendant’s insurance adjuster, by letter dated August 28, 2006, advised the plaintiff that it had made a determination that a back-up of the drain caused the damage to the plaintiff’s property and that said damage would be covered under the policy provision pertaining to “Flood, Back-up of Sewers, Underground Water and Mudflow” in the Package Enhanced Coverage Endorsement,<sup>1</sup> which had a limit of liability of \$10,000.

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The endorsement provision stated, in pertinent part, as follows:

**“Flood, back-up of Sewers, Underground Water, Mudflow**  
(1) You may extend the insurance provided by this policy to direct

By letter dated September 26, 2006, plaintiff's insurance adjuster advised the defendant of its disagreement with defendant's application of the coverage limitation and insisted that the subject loss was caused by an act of vandalism and fully covered under the policy. Specifically, plaintiff alleged that unknown individuals clogged the drain with debris on the evening of April 22, 2006, which caused the rain water to backup and overflow into the premises on the following day.

In December 2006, the plaintiff commenced the within breach of contract action against defendant seeking to recover \$113,694.15 for property damage. On or about January 12, 2007, defendant interposed an answer denying the allegations and asserting five affirmative defenses. Defendant now seeks leave to serve an amended answer and the plaintiff seeks summary judgment on its breach of contract claim.

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physical loss or damage caused by the following:

(a) Flood, surface water, waves, tides, tidal waves, overflow of any body of water or their spray all whether driven by wind or not;

(b) Mudslide or mudflow;

© Water that backs up from a sewer or drain; . . . .

\* \* \*

The most we will pay for the sum of all damages occurring during one policy period under this additional coverage is \$10,000. . . .”

## *Discussion*

### *Defendant's Motion to Amend Answer*

Defendant's motion seeking leave to amend its answer is granted. In the absence of prejudice or surprise to the plaintiff, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit ( *see Trataros Constr., Inc. v New York City Hous. Auth.*, 34 AD3d 451 [2006]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]; *Melendez v Bernstein*, 29 AD3d 872 [2006]). This rule is equally applicable to amendments of answers to interpose defenses ( *Sayers v Albicocco*, 298 AD2d 572 [2002]; *Hickey v Hutton*, 182 AD2d 801 [1992]).

Here, the defendant seeks to add an additional affirmative defense alleging that Exclusion B.1.g. (3) in the "Causes of Loss - Special Form CP10301000" section applies to the subject water damage loss. That section contained, *inter alia*, the following coverage limitations:

#### **B. Exclusions**

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

\* \* \*

#### **g. Water**

(3) Water that backs up or overflows from a sewer, drain or sump;

Defendant claims that the incident, in which the drain backed up with rain water and overflowed into the building, clearly falls within the above-mentioned exclusion limitation

regardless of any event (i.e., vandalism) which may have contributed to or caused the water damage. In this court's view, the plaintiff has failed to establish surprise or prejudice, and there is at least arguable merit to defendant's proposed amendment. Additionally, there is no merit to plaintiff's argument that the doctrine of *ejusdem generis* suggests that the exclusion applies only to underground water systems located inside of a building (*see Newlo Realty Co. v. U.S.F. & G. Corp.*, 213 AD2d 295 [1995]). There is no common understanding of the word "drain", or in the policy itself, that requires a construction limited to underground water. Therefore, the court hereby grants defendant's motion to amend, and the answer shall now be deemed to include the affirmative defense that Exclusion B.1.g. (3) applies to the subject loss. The court now turns to plaintiff's cross motion for summary judgment.

#### ***Plaintiff's Summary Judgement Cross Motion***

It is well established that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d at 562). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues"

(*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The court's function on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility but merely to determine whether such issues exist” (*Roth v Barreto*, 289 AD2d 557, 558 [2001]).

In support of its motion, plaintiff contends that vandalism, a covered occurrence under the policy, was the proximate, dominant and efficient cause of the water damage loss it sustained, and is therefore not subject to any exclusions or limitations. In this regard, plaintiff maintains that, on the night before the damage occurred, unknown individuals tried to break into the premises from the second floor porch/roof. When the break-in attempt failed, plaintiff contends that the unknown individuals clogged the roof drain by stuffing it with debris. Plaintiff asserts that the only reason why the drain backed up with rain water and seeped into the premises was because someone had intentionally clogged it. Plaintiff therefore contends that the defendant is liable for the loss it sustained because an act of vandalism (clogging of the drain), which is covered under the policy, was the proximate cause of the water damage.

In support of this contention, the plaintiff primarily relies upon the deposition testimony of Louis Bisaquino, the sole shareholder and president of TV Garage, wherein he testified that, after the pooling of water on the roof subsided, he noticed that the drain cover was not in place, and that rocks, balls, bats and footprints were on the roof. According to Mr. Bisaquino, none of these materials or the footprints had been on the roof the day before the water damage occurred. Mr. Bisaquino further testified that his mother, who resided on the second floor of the premises, told him that she heard someone on the roof the night before the water damage occurred. Plaintiff has also submitted a copy of a police report

documenting his vandalism complaint, and an invoice from the plumber who was hired to fix the clogged drain.

An insurance contract is to be interpreted by the same general rules that govern the construction of any written contract and enforced in accordance with the intent of the parties as expressed in the language employed in the policy ( *see Breed v Insurance Co. of N. America*, 46 NY2d 351, 355 [1978]). Plaintiff, as the insured, has the burden of showing that a valid insurance policy was in full force and effect and that it incurred a covered loss. Once the insured has met this burden, the burden of proof shifts to the insurer to demonstrate that an exclusion contained in the policy defeats the claim ( *see Throgs Neck Bagels, Inc. v GA Ins. Co.*, 241 AD2d 66, 71 [1998]; *Moneta Dev. Corp. v Generali Ins. Co.*, 212 AD2d 428, 429 [1995]). To 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 ( *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]; *Throgs Neck Bagels, Inc.*, 241 AD2d at 71). Further, “[p]olicy exclusions ‘are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction’” ( *Incorporated Village of Cedarhurst v Hanover Ins. Co.*, 89 NY2d 293, 298 [1996] *quoting Seaboard Sur. Co. v Gillette Co.*, 64 NY2d at 304, 311 [1984]).

As an initial matter, the court turns to the question of whether plaintiff's losses were, in the first instance, caused by a covered event, in this case vandalism, so as to bring the losses within the ambit of the policy ( *see Throgs Neck Bagels, Inc.*, 241 AD2d at 69; *see also 242-44 East 77th Street, LLC v Greater New York Mutual Ins. Co.*, 31 AD3d 100 [2006]).

In this regard, the court finds that the plaintiff has failed to establish, as a matter of law, that vandalism caused and/or contributed to the water damage that plaintiff's premises sustained. During his deposition, Mr. Bisquino admitted that, aside from seeing balls, bats, rocks and footprints on the roof, he never saw any other indication that there had been vandalism to the drain itself. Even though a plumber was eventually hired to fix the drain, Mr. Bisquino stated that they never determined what items and/or materials had actually clogged the drain. Rather, Mr. Bisquino assumed that someone had put rocks in the drain because he saw rocks, along with bats and footprints, on the roof of the premises. Additionally, the court notes that Mr. Bisquino's testimony that his mother told him that she heard someone on the roof the night before the water damage occurred constitutes unsubstantiated hearsay ( *see Wilbur v Wilbur*, 266 AD2d 535 [1999]). Moreover, Mr. Bisquino indicated that he did not see anyone on the roof when he went to investigate his mother's concerns. Furthermore, the police report upon which the plaintiff relies merely establishes that Mr. Bisquino filed a complaint of vandalism with the police a couple of days after the incident occurred. Mr. Bisquino himself testified that, to his knowledge, the police never investigated his complaint, nor did they ever make any arrests in connection with same. Based upon the foregoing, the court finds that the evidence proffered by the plaintiff in support of its motion for summary judgment fails to establish, as a matter of law, that a covered occurrence (i.e., an act of vandalism), caused and/or contributed to the subject water damage loss ( *see Winegrad*, 64 NY2d at 853; *Zuckerman*, 49 NY2d at 562). As such, plaintiff's cross motion

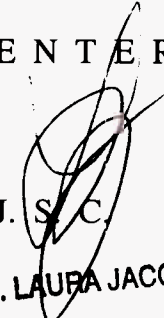
for summary judgment on its breach of contract cause of action against the defendant is denied.

***Conclusion***

In sum, defendant's motion seeking leave to amend its complaint to assert an affirmative defense is granted, and the plaintiff's cross-motion seeking summary judgment is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,  
J. S. C.  
HON. LAURA JACOBSON

A handwritten signature in black ink, appearing to read 'L. Jacobson', is written over the typed name 'HON. LAURA JACOBSON' and extends upwards into the 'E N T E R,' line.