

**Creditor v Liberty Mut. Fire Ins. Co.**

2007 NY Slip Op 33736(U)

November 14, 2007

Supreme Court, Suffolk County

Docket Number: 0012133/2005

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 12-18-06  
CAL. DATE 8-1-07  
Mot. Seq. # 001 - MD

-----X  
RICHARD CREDITOR, :  
Plaintiff, :  
- against - :  
LIBERTY MUTUAL FIRE INSURANCE :  
COMPANY, :  
Defendant. :  
-----X

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Upon the following papers numbered 1 to 15 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers           . Answering Affidavits and supporting papers 9-13; Replying Affidavits and supporting papers 14-15; Other           ; and after hearing counsel in support and opposed to the motion it is,

**ORDERED** that the motion by the defendant for summary judgment dismissing the complaint on the grounds that the subject loss is not covered under the homeowners' insurance policy is denied.

The plaintiff owns a residential property in Westhampton in Suffolk County, New York which was covered by a homeowners' insurance policy issued by the defendant Liberty Mutual Fire Insurance Company (hereinafter Liberty Mutual). On January 23, 2005, the plaintiff discovered that the in-ground swimming pool and the surrounding deck had collapsed. He filed a claim for the loss with Liberty Mutual under his homeowners' policy. Liberty Mutual investigated the claim and by letter, dated April 7, 2005, informed the plaintiff that there was no coverage for the loss under the policy.

Thereafter, the plaintiff commenced this action against Liberty Mutual for breach of contract alleging that the loss was reimbursable under the policy. The plaintiff now seeks \$80,000.00 in damages, which he alleges represents the reasonable amount necessary to replace the pool, the surrounding deck, and the landscaping which was damaged as a result of the work necessary to install and rebuild the pool. In its answer, as in its denial letter, Liberty Mutual maintains that there is no coverage for the loss based upon various provisions in the homeowner's policy.

In the affirmation in support of the motion, Liberty Mutual's counsel quotes the following provisions in the policy :

SECTION I – PERILS INSURED AGAINST

COVERAGE A – DWELLING and COVERAGE B – OTHER STRUCTURES

We insure against risk of direct loss to property described in Coverage A and B only if that loss is a physical loss to property. We do not insure, however for loss:<sup>1</sup>

2. Caused by:
  - b. Freezing, thawing, pressure of weight of water or ice, whether driven by wind or to a:
    - (1) Fence, pavement, patio or swimming pool;
  - e. Any of the following:
    - (1) Wear and tear, marring, deterioration;
    - (2) Inherent, vice, latent defect, mechanical breakdown;
    - (3) Smog, rust or other corrosion, mold, wet or dry rot;
3. Excluded under Section I – Exclusions.

SECTION I – EXCLUSIONS

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
  - c. Water Damage, meaning:
    - (3) Water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.
2. We do not insure for loss to property described in Coverage A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.
  - a. Weather Conditions. However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above to produce the loss.

Liberty Mutual argues that based on the conclusions in the affidavit of its expert, William R. Schlumpf, P.E., dated November 10, 2006, the pool collapsed as a result of the rotted tie-back system in conjunction with the lowered water level of the pool and the increase in the

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<sup>1</sup>In its papers in support of the motion, Liberty Mutual does not rely on paragraph 1 of this section which reads: "1. Involving collapse, other than as provided in Additional Coverage 8."

lateral earth pressure caused by the saturated condition of the ground. Thus, Liberty Mutual maintains, the loss is not one covered under Section I, Perils Insured Against, namely, subsection 2.e.(1) wear and tear, marring, deterioration, (2) latent defect, and (3) smog, rust, or other corrosion, mold, wet or dry rot. In addition, Liberty Mutual maintains, the loss is excluded under the introductory paragraph to Section I, Exclusions, as the expert also found that “the water below the surface of the ground was a contributing factor...[thus] the entire loss is excluded regardless of any other cause or event contributing concurrently or in any sequence”.

In opposition, the plaintiff has submitted the affidavit of its own expert, Alvin Ubell, dated March 15, 2007. The plaintiff’s expert asserts that the deterioration of the timbers due to damp rot is not an unusual condition in a pool which was constructed in 1979, and was not a contributing cause to the failure and collapse of the subject swimming pool. Rather, the plaintiff’s expert opines, “the cause of the failure and collapse of the swimming pool was due to the failure of the pool liner and water then pouring out in abundance.” The plaintiff’s expert asserts “[w]ith a reasonable degree of building inspection certainty and pool technology, the failure of the pool liner alone is the direct cause for the failure of the swimming pool bulkhead and coping.”

In reply, Liberty Mutual questions the qualifications of the plaintiff’s expert, who is a building inspector and not an engineer. It is well settled that the determination of a witness’ qualification to testify as an expert rests in the sound discretion of the court (see, **Meiselman v Crown Hgts. Hosp.**, 285 NY 389; **McLamb v Metropolitan Suburban Bus. Auth.**, 139 AD2d 572, 527 NYS2d 73 [1988]). Moreover, “[t]he competence of an expert in a particular subject may derive from long observation and real world experience, and is not dependent upon formal training or attainment of an academic degree in the subject” (**Miele v American Tobacco Co.**, 2 AD3d 799, 802, 710 NYS2d 386 [2003]; **McLamb v Metropolitan Suburban Bus Auth.**, *supra*).

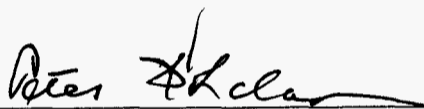
The plaintiff’s expert asserts that he has been in the construction industry since the early 1950s, and has inspected thousands of structures for the last 46 years, including swimming pools. The plaintiff’s expert also asserts that he has been recognized as an expert in the United States District Court, the Civil Court of the City of New York, and in the Supreme Court of the State of New York, that he has appeared on numerous television programs concerning home inspections, authored several books on maintenance, home repair and energy conservation, has taught and lectured at various institutions with regard to home inspections and repairs, and has been the recipient of several honor awards. Additionally, the plaintiff’s expert indicates that he has studied architecture at well known institutes and universities which he lists. Thus, for the purposes of this motion, the Court finds the plaintiff’s expert to be qualified to render an opinion on the cause of the subject swimming pool loss. Liberty Mutual’s objections to the qualifications of the plaintiff’s expert do not preclude the admission of his testimony, but rather will affect the weight to be accorded to it by the jury (see, **Miele v American Tobacco Co.**, *supra*; **McLamb v Metropolitan Suburban Bus Auth.**, *supra*). Further, the argument by Liberty Mutual that the plaintiff’s expert did not visit the scene is not persuasive as it is well-settled that an expert may rely on photographs and other evidence in the record (see, **Cuevas v City of New York**, 32 AD3d 372, 821 NYS2d 37 [2006]; **Ealey v City of New York**, 16 AD3d 543, 792 NYS2d 159 [2005]).

The Court has not considered the additional collapse coverage in the amendatory endorsement to the policy. Liberty Mutual waited until the submission of its reply papers to discuss this language, thereby depriving the plaintiff of a fair opportunity to respond (see, **Johnston v Continental Broker-Dealer Corp.**, 287 AD2d 546, 731 NYS2d 666 [2001]; **Chavez v Bancker Constr. Corp.**, 272 AD2d 429, 708 NYS2d 325 [2000]). Thus, viewing the evidence in the light most favorable to the plaintiff as the non-moving party, including the provisions in the policy relied upon by Liberty Mutual in its moving papers, together with the competing expert affidavits regarding the cause of the loss, the motion must be denied (see, **Sutherland v Thering Sales & Service, Inc.**, 38 AD3d 967, 830 NYS2d 833 [2007]; **DeCicco v Longendyke**, 37 AD3d 934, 829 NYS2d 284 [2007]).

The Court also denies that branch of the defendants' motion which seeks an order that the damages to the plaintiff's pool and deck come within the Coverage B policy limit of \$31,890 and that there is no coverage for the landscaping and shrubs. Coverage A of the policy covers "structures attached to the dwelling." Coverage B covers "other structures on the 'residence premises' set apart from the dwelling by clear space." The papers submitted by Liberty Mutual do not establish whether the deck surrounding the swimming pool was a structure attached to the dwelling or was set apart from the dwelling. Moreover, issues of fact exist as to whether the pool and deck are two separate structures. Therefore, it is inappropriate to issue an order limiting any damages recovered to the Coverage B policy limit. It is also inappropriate to issue an order that there is no coverage for the landscaping and shrubs as they were damaged by "vehicles not owned by a resident of the residence premises."

Accordingly, the motion by the defendant is denied in its entirety.

Dated: NOV 14 2007

  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION