Roy v Encompass Ins.
2008 NY Slip Op 30487(U)
February 21, 2008
Supreme Court, Suffolk County
Docket Number: 0007963/2006
Judge: Denise F. Molia
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SHORT FORM ORDER

INDEX No. 06-7963
CAL. No. 07-02483-CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 12-18-07
Mot. Seq. # 001 - MG

STEVEN R. ROY and KELLY L. ROY, Plaintiffs, - against - ENCOMPASS INSURANCE a/k/a ENCOMPASS PROPERTY AND CASUALTY COMPANY a/k/a ENCOMPASS INSURANCE AGENCY, RESEARCH & EDUCATION and A-1 ROOFING AND SIDING, Defendants	DENKOVICH & BURSHTEYN, P.C. Attorneys for Plaintiffs 46 Knickerbocker Road Plainview, New York 11803 FEENEY & ASSOCIATES, PLLC Attorneys for Defendants Encompass 503 Route 111 Hauppauge, New York 11788 ERIC A. SACKSTEIN, ESQ. Attorney for Defendant A-1 Roofing P.O. Box 436 Port Jefferson, New York 11777

Upon the following papers numbered 1 to 25 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 14 - 21 ; Replying Affidavits and supporting papers 22 - 23 ; Other 24 - 25 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment dismissing the claims against it is granted.

Plaintiffs Steven Roy and Kelly Roy are the owners of a residence located at 15 Pacific Street, Bay Shore, New York. In 2005, plaintiffs filed a claim under an insurance policy issued by defendant Encompass Property & Casualty Company, s/h/a Encompass Insurance, for damage to their roof. The claim was approved by Encompass Property & Casualty Company (hereinafter Encompass), and defendant A-1 Roofing and Siding (hereinafter A-1 Roofing) was hired to replace the roof at plaintiffs' residence. Thereafter, in January 2006, plaintiffs allegedly discovered an extensive mold condition in the roof and the attic of their home. In February 2006, a claim for mold remediation was filed by plaintiffs with Encompass. By notice dated February 2, 2006, Encompass disclaimed liability on the ground that plaintiffs failed to give prompt notice of the claim.

Subsequently, plaintiffs commenced the instant action against Encompass and A-1 Roofing to recover damages for breach of contract and negligence. Plaintiffs also assert a claim for attorney's fees. The complaint alleges, in relevant part, that A-1 Roofing failed to properly install the roof at plaintiff's residence and that, as a result, a mold condition developed on the roof and in the attic. It alleges that plaintiffs first became aware of a leak in the roof and mold in the attack on or about January 30, 2006 and filed a claim with Encompass on February 1, 2006. It further alleges that Encompass breached its insurance contract by improperly denying plaintiffs' claim for property damage. The answer served by Encompass asserts various affirmative defenses, including the defenses that the insurance policy issued to plaintiffs does not cover mold damage, and that plaintiffs breached their contractual obligation to give prompt notice of the claim. It also interposes a cross claim against A-1 Roofing for indemnification.

Encompass now moves for summary judgment dismissing the claims against it on the grounds that the insurance policy issued to plaintiffs does not provide coverage for mold damage, and that plaintiffs failed to give it timely notice of the claim and to mitigate the damages allegedly caused by the improper installation of the roof. In support of the motion Encompass submits copies of the pleadings, the transcripts of plaintiffs' deposition testimony, the February 2007 disclaimer notice, and plaintiffs' insurance policy. Encompass also submits an affidavit by Richard Denue, a senior claims representative, averring that plaintiffs first notified the insurer of the subject claim by telephone on February 2, 2006, and that during such telephone conversation it was informed that plaintiffs had discovered the mold in December 2005.

Plaintiffs oppose the motion, arguing that the mold exclusion contained in the homeowner's insurance policy does not apply, because the property damage at issue, in fact, was caused by the negligent workmanship of A-1 Roofing, a contractor "approved and hired by defendant Encompass." Plaintiffs also argue that Encompass failed to demonstrate that they were prejudiced by any delay in notification of the claim or that plaintiffs breached their obligation to mitigate damages. In opposition, plaintiffs submit, among other things, a copy of the adjuster's statement prepared in connection with plaintiffs' 2005 insurance claim for the replacement of the roof at plaintiffs' residence, and a copy of an engineer's report, dated February 15, 2006, detailing the mold condition at plaintiffs' residence. Also submitted in opposition to the motion is an affidavit by plaintiff Kelly Roy. The affidavit states, in relevant part, that plaintiff Steven Roy first noticed wetness in the attic in December 2005; that he discovered "white fuzz" in the attic on or about January 10, 2006; that plaintiffs were advised by A-1 Roofing on January 30, 2006 that the substance in the attic may be mold; and that plaintiff Kelly Roy contacted Encompass and filed a claim for the property damage on or about February 1, 2006. It further states the plaintiff was made aware of the presence of mold on January 30, 2006, and "forthwith made a complaint to the insurance carrier on February 1, 2006." The Court notes that the unsworn engineer's report was not in admissible form (*see* ***Ellis v Willoughby Walk Corp. Apts.***, 27 AD3d 615, 811 NYS2d 775 [2d Dept 2006]).

The insurance policy in question issued to plaintiffs by Encompass was a renewal policy that included both automobile liability coverage and "home protection" coverage. As relevant to the instant dispute, the "Home" segment of the policy states "[w]e cover direct physical loss to property described in Real Property - Insuring Agreement, unless the loss is not covered under Property Coverage - Loses We Do Not Cover." In the section entitled "Losses We Do Not Cover," the policy states "[w]e 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." Within this section, the policy states as follows: "Real Property. We do not insure for loss . . . [c]aused by. . . rust or other corrosion, mold, fungi, wet or dry rot." Subsection g of the "Losses We Do Not Cover" section further states that no coverage is provided for loss to covered real property caused by "faulty, inadequate or defective . . .design, workmanship, repair, construction, renovation, remodeling, grading, compaction."

The aim of a court interpreting a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and to reach a "practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (***Joseph v Creek & Pines***, 217 AD2d 534, 535, 629 NYS2d 75 [2d Dept], *lv dismissed* 86 NY2d 885, 635 NYS2d 950 [1995], *lv denied* 89 NY2d 804, 653 NYS2d 543 [1996]; *see* ***Petracca v Petracca***, 302 AD2d 576, 756 NYS2d 587 [2d Dept 2003]; ***Fetner v Fetner***, 293 AD2d 645, 741 NYS2d 256 [2d Dept 2002]; ***Partrick v Guarniere***, 204 AD2d 702, 612 NYS2d 630 [2d Dept], *lv denied* 84 NY2d 810, 621 NYS2d 519 [1994]). It is a cardinal rule of construction that a court should not interpret a contract in such a way as would leave one of its provisions substantially without force or effect (*see* ***Two Guys from Harrison-N.Y. v S.F.R. Realty Assocs.***, 63 NY2d 396, 482 NYS2d 465 [1984]; ***Corhill Corp. v S.D. Plants, Inc.***, 9 NY2d 595, 217 NYS2d 1 [1961]; ***Petracca v Petracca***, *supra*; ***Malleolo v Malleolo***, *supra*; ***Matter of John E. Andrus Mem. Home v De Buono***, 260 AD2d 635, 688 NYS2d 687 [2d Dept], *lv denied* 93 NY2d 813, 697 NYS2d 561 [1999]). Further, a court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, and it may not construe the language used in such a way as would distort the contract's apparent meaning (*see* ***Slamow v Del Col***, 79 NY2d 1016, 584 NYS2d 424 [1992]) *supra*; ***Matter of Kalman v Kalman***, 300 AD2d 487, 751 NYS2d 578 [2d Dept 2002]; ***Cohen-Davidson v Davidson***, 291 AD2d 474, 740 NYS2d 68 [2d Dept 2002]; ***Matter of Scalabrini v Scalabrini***, 242 AD2d 725, 662 NYS2d 581 [2d Dept 1997]).

Courts bear the responsibility of determining the rights and obligations of parties to an insurance contact based on the specific language used in the policy (***State of New York v Home Indemn. Co.***, 66 NY2d 669, 671, 495 NYS2d 969 [1985]). As a general rule, policies of insurance are construed liberally in favor of the insured and strictly against the insurer (***Government Empls. Ins. Co. v Kligler***, 42 NY2d 863, 864, 397 NYS2d 777 [1977]; ***State Farm Mut. Auto. Ins. Co. v Westlake***, 35 NY2d 587, 591, 364 NYS2d 482 [1974]; *see* ***Matter of New York Cent. Mut. Fire Ins. Co. v Ward***, 38 AD3d 898, 833 NYS2d 132 [2d Dept 2007]), and any ambiguity must be construed against the insurer (***White v Continental Cas. Co.***, 9 NY2d 264, 267, 848 NYS2d 603 [2007]; ***Marshall v Tower Ins. Co. of N.Y.***, 44 AD3d 1014, 1015, 845 NYS2d 90 [2007]). Thus, when an insurer wishes to exclude certain coverage from its policy obligations, it must do so in "clear and unmistakable" language (***Seaboard Sur. Co. v Gillette Co.***, 64 NY2d 304, 311, 486 NYS2d 873 [1984], *citing* ***Kratzenstein v Western Assur. Co.***, 116 NY 54, 59, 22 NE 221 [1889]; *see* ***Labate v Liberty Mut. Ins. Co.***, 45 AD3d 811, 847 NYS2d 128 [2d Dept 2007]; ***Catucci v Greenwich Ins. Co.***, 37 AD3d 513, 830 NYS2d 281 [2d Dept 2007]). However, where the provisions of an insurance contract are clear and unambiguous, they must be given their plain and ordinary meaning (***White v Continental Cas. Co.***, *supra*, at 267, 848 NYS2d 603; *see* ***Marshall v Tower Ins. Co. of N.Y.***, *supra*; ***Hiraldo v Allstate Ins. Co.***, 8 AD3d 230, 778 NYS2d 50 [2d Dept 2004], *affd* 5 NY3d 508, 806 NYS2d 451 [2005]). Courts may not vary the terms of an insurance contract to accomplish their notions "of abstract justice or moral obligation, since 'equitable considerations will not

allow an extension of the coverage beyond its fair intent and meaning in order to do raw equity and to obviate objections which might have been foreseen and guarded against'" (***Breed v Insurance Co. of N. Am.***, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *quoting* ***Weinberg & Holman, Inc. v Providence Washington Ins. Co.***, 254 NY 387, 391, 173 NE 556 [1930]; *see* ***Government Empls. Ins. Co. v Kligler***, *supra*).

Encompass established prima facie that plaintiffs' claim for damage to their residence caused by mold falls outside the scope of the insurance policy issued to plaintiffs (*see* ***Catucci v Greenwich Ins. Co.***, *supra*). Here, the unambiguous language of the subject insurance policy demonstrates that liability for loss caused by "rust or other corrosion, mold, fungi, wet or dry rot" was specifically excluded from the home protection coverage provided to plaintiffs by Encompass (*see* ***Catucci v Greenwich Ins. Co.***, *supra*; ***Hritz v Saco***, 18 AD3d 377, 795 NYS2d 236 [1st Dept 2005]; *see also* ***Kay Bee Bldrs., Inc. v Merchant's Mut. Ins. Co.***, 10 AD3d 631, 781 NYS2d 692 [2d Dept 2004]). Plaintiffs' argument that the mold exclusion does not apply, because the damage to the roof and attic was, in fact, due to A-1 Roofing's negligent installation of the roof is rejected (*see* ***Siegel v Chubb Corp.***, 33 AD3d 565, 825 NYS2d 441 [1st Dept 2006]). In any event, as mentioned above, the subject insurance policy contains an exclusion for property damage caused by "faulty, inadequate or defective . . .design, workmanship, repair, construction, renovation, remodeling, grading, compaction" (*cf.* ***Zandri Constr. Co. v Firemen's Ins. Co. of Newark***, 81 AD2d 106, 440 NYS2d 353 [3d Dept], *affd* 54 NY2d 999, 446 NYS2d 45 [1981]). Accordingly, as plaintiffs have failed to raise a triable issue of fact as to whether the mold exclusion applied, summary judgment dismissing the claims against Encompass is granted.

Dated: 2/21/08

DENISE F. MOLIA
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION