

**Jahier v Liberty Mut. Group**

2008 NY Slip Op 32825(U)

October 8, 2008

Supreme Court, Suffolk County

Docket Number: 07-20565

Judge: John J.J. Jones

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insurance policy No. H36-228-046335-406 provides coverage for the loss sustained by the plaintiffs.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (001) the Liberty defendants have submitted, inter alia, an attorney's affirmation; the affidavit and curriculum vitae of Anthony Pollio; copies of the summons and complaints and answer; copies of color photographs of the pool; uncertified copy of Climatological Observations; affidavit of Phillip Angelillo; uncertified typed copy of a telephone call; a copy of the homeowner's insurance policy; disclaimer of coverage letter dated May 14, 2007; copy of the transcript of the examination before trial of Jeffrey Jahier; and discovery exchanges.

In support of motion (002) by the Jahier plaintiffs have submitted, inter alia, an attorney's affirmation; copies of the pleadings and answer; a copy of the insurance policy for the premises; copies of five colored photographs; a copy of the letter from defendant dated May 14, 2007; a copy of an affidavit of service for the summons and complaint in the underlying action, and various correspondence.

Anthony Pollio set forth in his affidavit submitted on behalf of the Liberty defendants that he is a licensed professional engineer, and that on November 30, 2007, he went to 383 Carlls Straight Path, Dix Hills, to investigate damages to the in-ground swimming pool. He described the pool as irregularly shaped, nine feet deep at the deeper end and three feet deep at the shallow end, and partially filled with water. A brick patio/walkway was located around part of the swimming pool. The swimming pool, he states, was gunite construction, and stone and brick were used for the coping, with a large stone at the front wall of the pool used for diving. He observed that the deeper end of the pool had lifted up above the ground approximately 6" to 8", and the shallow end of the pool had also lifted slightly above the ground. He states the lifting of the swimming pool caused damage to the brick patio/walkway surrounding the pool, and the lifting of the pool caused the walls of the pool to crack and caused damage

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to the plumbing system related to the pool. He submitted copies of photographs he took which he states are a fair and accurate representation of the damages.

Phillip Angelillo set forth in his supporting affidavit that he is currently employed as a Team Manager by Liberty Mutual and is familiar with the plaintiffs' claim for which Jeffrey Jahier made the initial report of loss by telephone on May 11, 2007, advising he first noticed the damage on April 16 or 17, 2007. He states that there is no coverage for the damages to the plaintiffs' swimming pool because the cause of loss is excluded under the policy, but should the court find that there is coverage under the insurance policy, the coverage is limited to \$69,180.00 under Coverage B (then set forth in the Reply as \$59,180).

The letter dated May 14, 2007 to the plaintiffs from Monique Caputo, Senior Property Loss Specialist for the Liberty defendants, advises that upon completion of their investigation, the damage to the pool is due to groundwater and earth movement. Based upon those findings, she advises, there is no coverage for this loss under their homeowner policy with Liberty Mutual as Section 1-Exclusions sets forth "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...b. Earth Movement...landslide; mine subsidence; mudflow; earth sinking, rising or shifting...c. Water Damage, meaning: (1) Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;...(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..." At "Section 1-Perils Insured Against states" [w]e do not insure, however, for loss....2. Caused by:...b. Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a :...(1)Fence, pavement, patio or swimming pool..."

Bruce W. Farquharson, Esq. has submitted an affirmation in support of the defendants' motion (001) wherein he states that the pool comes under Coverage B because it is a structure on the residence premises separated from the dwelling by clear space. It is noted that it is set forth at "Coverage B-Other Structures," that [w]e cover other structures on the "residence premises" set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line or similar connection.

Jeffrey A. Jahier testified at his examination before trial (of which only a partial copy was submitted by the defendants) that he has resided at the premises for twenty three years and that the pool, located in his backyard, was constructed about twenty years ago by Imperial Pool Company. He described the pool as being about forty feet long and twenty feet wide.

Plaintiff's response to defendants' notice for discovery and inspection reveals that the plaintiffs entered into a contract with Intercoastal Specialty Contracting Corp. on January 7, 2007 for some repair work on the pool involving replacing the tiles on the walls of the pool and marble dusting the pool. Mr. Jahier testified did not have any leaking in the pool. On or about March 31, 2007, Intercoastal drained the pool and removed some existing tile and installed some new tile to the walls of the pool. It was in April, after he returned from a weekend away that he noticed the patio had sunk and realized that somehow the pool had lifted, the deep end more so than the shallow end. The water had been previously

drained from the pool but when he noticed the pool had lifted, he also noticed some water in the pool. He called Intercoastal who came to his house and added water to the pool with a hose. He thereafter again called Intercoastal, but they never returned his phone calls. He let the pool fill with the water, but it did not make any difference in the elevation of the pool. He stated it had rained during the time he was away in Rhode Island and it was raining as he was riding home. He also testified that in addition to the lifting of the pool, there was a tremendous amount of cracks throughout the bottom of the pool and damage to the plumbing. Mr. Jahier also testified that there was a slope in the backyard which sloped away from the pool and over toward the house and the other side, with some pooling away from the pool by the house. When the pool was being installed twenty years ago, they had a landscape architect grade the property and brought in topsoil to raise the pool to a level so there would not be any problems, and they have not had any problems.

Based upon the foregoing, and in consideration of the entirety of all the submissions, it is determined that the defendants have not demonstrated prima facie entitlement to summary judgment dismissing the complaint as there has been no testimony or supporting evidence to demonstrate that the ground water or earth movement was the legal cause of the occurrence.

Although Anthony Pollio set forth that the land to the left rear of the pool slopes steeply downward toward the swimming pool area directing surface water and subsurface water toward the pool where it can cause the ground to become saturated, causing the water table level around the swimming pool structure to rise because the buoyant force of the water below the ground exceeds the weight of the swimming pool structure, there has been no supporting evidence to show the degree of the grade, where the water allegedly actually runs to, what amount of pressure would be necessary to cause the incident, and that this was the legal cause of the incident. It is Mr. Pollio's opinion that the swimming pool was lifted out of the ground at the time of the loss because the buoyant force created by the ground water exceeded the weight of the swimming pool. However, he does not explain why this did not occur during the twenty years preceding this incident and only occurred on this particular occasion when the pool was emptied of water. There is no supporting evidence indicating that the buoyant force of the water was so unusually different from the normal environment to create the necessary amount of buoyant force to raise the pool, even if it were filled with water, or how the environment was different from other times with heavy rain over the last twenty years when the swimming pool did not rise out of the ground. Mr. Pollio also states his review of the weather records reveals that the day before the loss more than three inches of rain fell in a twenty four hour period causing the water table to rise, resulting in the pool structure rising from the ground. He states that the fact that the pool was drained set the stage for the loss to occur and if the pool had been drained but there was no heavy rainfall, the loss would not have occurred.

It is determined that the defendants' expert's statements are conclusory without evidentiary support, and conflicting at best in that he attributes the occurrence of the rising of the pool to heavy rainfall, the slope of the land, and the buoyant force of the ground water, and then states that the emptying of the pool set the stage for the loss to occur. Defendants' expert's statements and opinions lead this court to come to no other conclusion than, as a matter of law, that the cause of the lifting of the pool was due to the pool being emptied of water for the repair work to be done to it. Additionally, coverage was denied on the basis of land movement also, however, defendants' expert does not support

this or even suggest that there was land movement which caused the pool to rise.

In a case on point, *Bebber v CNA Insurance Company*, 189 Misc2d 42, 729 NYS2d 844 [Sup. Ct. of New York, Erie County 2001]), wherein the insurance company disclaimed coverage based upon a policy exclusion for property damage caused by water damage, meaning water below the surface of the ground, including water which exerted pressure on swimming pools or other structures causing a lifting of the swimming pool, the court held that but for the drainage of the pool the damage would not have occurred. The draining of the water from the pool set in motion subsequent natural processes which resulted in the damages. The court further stated this was not an act of God wherein an unexpected action of natural forces increased the water pressure.

As in the instant action, the defendants in *Bebber v CNA Insurance Company*, supra, did not demonstrate that the underground hypostatic pressure was any different before, during, or after the damage to the pool, and that when the natural force was present before or concurrent with the affirmative act (of emptying the pool), the natural force could not be considered an intervening or concurrent cause of the damage in determining legal liability, and therefore, the policy exclusion did not apply. Under these circumstances, the court held, plaintiff's draining of the pool was the legal cause of the damage for purposes of the policy exclusion. The court further set forth that "[i]f the intervening force is in operation at the time the defendant acted, it is not an intervening cause at all. The natural force is simply part of the environment within which the affirmative act leading to the damage takes place. Put another way, the 'status quo' was disturbed by the draining of the pool rather than by any change in the underground water pressure or ground movement. In both a legal and pragmatic sense, this damage was 'caused' by the action of the plaintiff draining the pool."

The court further set forth that the "[t]he meaning of the pivotal word 'cause' has primarily developed in the context of tort and insurance law where causation is an essential element in establishing liability. The leading test utilized in determining legal causation is the sine qua non, or but for test. Under this approach one asks if the event would not have happened but for the action which is being considered as a possible legal cause of the alleged damage. A corollary principle to the but for test is the train of events test which looks to the triggering instrumentality as the cause so long as the results were a natural sequence of the trigger event and would not otherwise have occurred. A circumstance which merely sets the stage is not regarded as being a proximate cause merely because the circumstance made possible the subsequent loss."

Based upon the foregoing, and in that the defendants' expert opined that the buoyant force of the water below the ground exceeded the weight of the swimming pool structure, this court can only conclude, as the *Bebber* court determined, that the natural force is simply part of the environment within which the affirmative act leading to the damage takes place when the water is emptied out of the pool. Put another way, the 'status quo' was disturbed by the draining of the pool rather than by any unusual change in the underground water pressure or ground movement. In both a legal and pragmatic sense, this damage was 'caused' by the action of the plaintiff draining the pool.

The defendants also argue, as a basis for disclaiming all responsibility to indemnify on this claim,

that the policy of insurance in effect on the plaintiffs' premises excludes the event which caused their swimming pool to rise and cite to the Policy of Insurance at:

“Section 1, Coverage A-Dwelling and Coverage B-other structures, the policy (at page 6) sets forth, “We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property. We do not insure, however, for loss: 1. Involving collapse<sup>1</sup>, other than as provided in Additional Coverage 8.; Caused by ...b. Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a: (1) Fence, pavement, patio or swimming pool....”

Section 1-Exclusions set forth “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.... b. Earth Movement, meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide, mine subsidence; mudflow, earth sinking, rising<sup>2</sup> or shifting,... c. Water Damage, meaning: (1) Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;...(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.”

Coverage B-Other Structures, sets forth that “We cover other structures on the ‘residence premises’<sup>3</sup> set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line or similar connection.”

The insurer bears the burden of establishing the validity of the exclusion upon which it bases a denial of coverage under a policy of insurance. Any exclusion or exception from insurance policy coverage must be specific and clear in order to be enforced. Exclusions or exceptions are not to be extended by interpretation or implication, but are to be accorded strict and narrow construction. When relying on an exclusionary clause, an insurer must show not only that its interpretation of the clause is reasonable, but that the clause cannot be reasonably interpreted in any other way. While the court should not strain to find ambiguity where the words of an exclusionary clause are definite and precise, where an ambiguity exists it must be resolved in favor of the insured to the end that coverage is afforded to the full extent that any fair interpretation will allow (*In the Matter of Aetna Casualty and Surety Company*, 149 Misc2d 1011, 566 NYS2d 842 [Sup. Ct. Nassau County 1991]; *Rocon Manufacturing, Inc. v Randy Ferraro and Nationwide Insurance Company*, 199 AD2d 999, 605 NYS2d 591 [4<sup>th</sup> Dept 1993]).

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<sup>1</sup>Collapse is not defined in the policy, however, the plaintiffs have not alleged that their pool collapsed but claim it rose up and developed cracks.

<sup>2</sup>The defendants' expert has not set forth in his report that there was movement of the earth, only a difference in hydrostatic pressure greater than the weight of the pool.

<sup>3</sup>Residence premises is set forth in the policy as meaning in the applicable part “a. The one family dwelling, other structures, and grounds.

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“An insurer’s duty to defend must be determined from the allegations of the complaint. If the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend....Moreover, to negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject of no other reasonable interpretation, and applies in the particular case. Policy 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 Insurance Company*, 89 NY2d 293, 653 NYS2d 68 [1996]).

In order to sustain the construction of an exclusionary provision in a policy against the insured, the insurer has the burden of establishing that its construction or interpretation of the policy is the only construction that can be fairly placed thereon (*In the Matter of Allstate Insurance Company v James Borczynski*, 193 AD2d 1064, 598 NYS2d 407 [4<sup>th</sup> Dept 1992]).

In the instant action, in that the defendants have not demonstrated that the water pressure or earth movement was the only reasonable legal “cause” of the damage, and in that the defendants’ expert states the draining of the pool factors into the occurrence, and that the rising of the pool was caused by the buoyant force of the water which exceeded the weight of the swimming pool structure it is determined that the defendants have not met their burden of demonstrating entitlement to summary judgment by demonstrating that coverage is precluded by the exclusionary clauses in the homeowner’s policy. It is further determined that, based upon the defendants’ expert’s affidavit, the legal cause of the pool rising was the fact that the pool had been drained thus permitting the ever-present natural environmental elements to lift the pool.

Accordingly, that part of motion (001) by the defendants for summary judgment dismissing the complaint on the basis that there is no liability and no coverage for the occurrence is denied .

Although counsel for the defendants sets forth in his affirmation in support of motion (001) that the pool comes under Coverage B because it is a structure on the residence premises separated from the dwelling by clear space, and to the extent that any damage might be covered under the policy, that such coverage should be limited to \$69,180 (although later stated to be \$59,180 in his Reply), it is determined that the amount of coverage is to be determined by reading the policy as a whole. Coverage B provides coverage in the amount of \$59,180 for damage to other structures on the residence premises, in addition to the Inflation Protection Credit and endorsements to the policy for Inflation.

Accordingly, that part of the defendants’ motion (001) to limit the coverage to \$59,180 is denied to the extent that such coverage shall be in an amount determined when considering the entire policy and applicable endorsements and inflation.

In that the defendants have failed to demonstrate that the within occurrence falls within the exclusions of the insurance policy covering the plaintiffs’ premises, and in that this court determined that as a matter of law in motion (001) that the legal cause of the occurrence was the draining of the pool and not any of the causes set forth in the policy exclusions, the plaintiffs’ cross motion (002) for summary judgment for an order declaring that the defendants must provide coverage under the policy for the

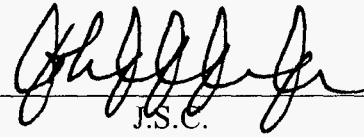
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claimed damages has been established.

Accordingly, motion (002) is granted and it is declared that the defendants must provide coverage under the policy for the claim submitted in an amount within the policy limits provided, factoring in inflation pursuant to the Inflation Protection Endorsement and the Residential Building Cost Information System Index of Marshall and Swift provided for in the policy, and the provisions set forth in the Loss Settlement paragraph 3 of the policy.

Settle judgment.

Dated: 8 Oct 2008

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION