

11 Essex St. Corp. v Tower Ins. Co. of N.Y.

2008 NY Slip Op 32991(U)

October 24, 2008

Supreme Court, New York County

Docket Number: 600176/2004

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 600176/2004
 11 ESSEX STREET CORP.
 VS.
 TOWER INS. CO. OF NY
 SEQUENCE NUMBER : 007
 AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in 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 *is decided as*
attached

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

FILED
 NOV 05 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 10/24/08

[Signature]

 J.S.G.
 EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
11 ESSEX STREET CORP.,

Plaintiff,

-against-

Index No. 600176/2004

TOWER INSURANCE COMPANY OF NEW YORK,

Defendant.

-----X
EMILY JANE GOODMAN, J.S.C.:

FILED
NOV 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

Defendant Tower Insurance Company of New York (Tower) moves to amend its answer to include, as affirmative defenses, the policy exclusion for "faulty workmanship" and for "wear and tear." Plaintiff objects to Tower's amendment as prejudicial and unsupported by the evidence. The motion is denied with leave to renew as to the "faulty workmanship" exclusion, and is denied with respect to the "wear and tear" exclusion.

Plaintiff 11 Essex Street Corp. (11 Essex) seeks to recover for property damage to its building and for loss of business income under its insurance policy with Tower. Plaintiff's building allegedly suffered extensive physical damage on February 12, 2002, as a result of excavation and demolition at an adjacent construction project at 7-9 Essex Street, New York, New York (7 Essex). On or about February 12, 2002, Sion Mishrahi, the owner of Plaintiff, observed cracking and shifting in the walls, floors and the rear yard of 11 Essex. It has not been disputed that the New York City Department of Buildings shut down ongoing construction at 7 Essex and ordered bracing to be installed at 11 Essex. Plaintiff alleges that large amounts of

earth and bedrock were removed from the adjacent property without adequate precautionary measures to prevent damage to neighboring land and structures. Defendant has denied coverage, invoking several policy exclusions.

As Plaintiff correctly notes, by decision and order, dated November 22, 2005 (which was subsequently affirmed), the Court held that the policy exclusion for “negligent/faulty workmanship” did not apply to negligent construction at the adjacent project site, which allegedly caused damage to Plaintiff’s building, but applied only to property damage caused when the insured, or someone authorized by the insured, negligently performs work damaging the insured’s property. Three years later, Tower now seeks to amend its answer to allege the defense of the “faulty workmanship” exclusion in connection with Plaintiff’s lowering of its own basement. Despite the evidence which indicates that the damages to 11 Essex were observed around the same time as construction work was being performed at 7 Essex, which was temporarily shut down by the Department of Buildings, Tower argues that it recently came to light that the damages “may” have been caused in whole or in part, by Plaintiff’s lowering of its basement.

Tower does not submit an affidavit of an expert in support of its theory. Instead, it relies upon the deposition testimony of Chris Prokop, a principal of 7 Essex, who testified in a conclusory fashion that 7 Essex investigated the cause of the damages to 11 Essex and attributed it to Plaintiff’s lowering of its basement, without proper structural support. Tower also cites the testimony of Stuart Gold, an engineer who testified that when he designed the underpinnings for Plaintiff, he was unaware of Plaintiff’s lowering of its basement floor, and that had he been so aware, he would have designed the underpinning differently. He also testified in a conclusory

fashion, that the lowering of the basement would cause cracking or could cause shifting.

The evidence Tower relies on does not support its theory. The testimony of Prokop, who is not an expert, is conclusory. When he was asked for the specifics of the investigation, he declined to give any, stating that he was more focused on finding a solution. The testimony of Gold is inconclusive. The fact that he may have designed the underpinnings differently is irrelevant. Moreover, his two sentence conclusion that Plaintiff's lowering of the basement would have caused cracking and could have caused shifting, without more, is insufficient. Accordingly, Tower is permitted to renew its motion, upon an affidavit of an expert.

As to Tower's request to amend its answer to assert the "wear and tear" exclusion, that request is denied as unsupported, and, as contradicted by the evidence. Tower maintains that much of the damages are the result of the fact that the building is 100 years old, a fact which was known to Tower at least as of September 25, 2006, when the deposition of Sion Misrahi was held. It proffers no expert affidavit but expects that the Court will allow amendment based merely on the fact that the building is old. Tower not only fails to sustain its burden to show its amendment has merit but its conclusion flies in the face of the evidence which connects the damages at issue to the construction at 7 Essex.

Accordingly, it is hereby

ORDERED that Defendant's motion is denied with leave to renew as to the "faulty workmanship" exclusion upon an expert's affidavit, and is denied with respect to the "wear and tear" exclusion; and it is further

ORDERED that renewal must be made within 20 days of receipt of a copy of this

Decision and Order.

This Constitutes the Decision and Order of the Court.

Dated: October 24, 2008

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED
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COUNTY CLERK'S OFFICE
NEW YORK