

**Hudson 500 LLC v Tower Ins. Co. of
N.Y.**

2008 NY Slip Op 33239(U)

November 20, 2008

Supreme Court, New York County

Docket Number: 111594/2006

Judge: Marylin G. Diamond

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

PRESENT: MARYLIN G. DIAMOND

PART 48

Index Number : 111594/2006

HUDSON 500

vs

TOWER INSURANCE

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied pursuant to the decisional order attached hereto.

ENTER ORDER

FILED

DEC 05 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/20/08

MGD
MARYLIN G. DIAMOND J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 48

-----X
HUDSON 500 LLC,

Plaintiff,

-against-

TOWER INSURANCE COMPANY OF NEW YORK,

Defendant.
-----X

MARILYN G. DIAMOND, J.:

Index No. 10594/06

FILED
DEC 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

This case involves a claim by plaintiff Hudson 500 (Hudson) for insurance coverage under policy number CPP2520800, issued by defendant Tower Insurance Company of New York (Tower), relating to what Hudson alleges was a partial collapse of its building, located at 500 Hudson Street a/k/a 130 Christopher Street, New York, New York (the building), on or after August 23, 2005.

In motion sequence number 004, Tower moves for summary judgment in its favor on the grounds that: 1) Hudson's alleged loss occurred prior to the period covered by the insurance policy in question, and 2) provisions in the policy preclude the loss.

In motion sequence number 005, Hudson moves for partial summary judgment on the issue of liability under the policy. Motion sequence numbers 004 and 005 are consolidated for disposition.

The limits for damages to property under the policy are \$700,000; the limits for loss of business income are \$200,000.

The relevant policy provisions state as follows:

B. EXCLUSIONS

2. We will not pay for loss or damage caused by or resulting from any of the following

* * *

d. (1) Wear and tear

(2) Rust, corrosion, fungus, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;

* * *

(4) Settling, cracking, shrinking or expansion.

* * *

3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. result in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

* * *

c. Faulty, inadequate or defective:

* * *

(4) Maintenance;

of part or all of any property on or off the described premises.

D. ADDITIONAL COVERAGE - COLLAPSE

1. We will pay for direct physical loss or damage to Covered Property, caused by collapse of a building or any part of a building insured under this Coverage Form, if the collapse is caused by one or more of the following:

* * *

b. Hidden decay;

* * *

f. Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction; remodeling or renovation if the collapse occurs during the course of construction; remodeling or renovation. However, if the collapse occurs after construction, remodeling or renovation is complete and is caused in part by a cause of loss listed in D.1.a. through D.1.e., we will pay for the loss or damage even if use of defective material or methods, in construction, remodeling or renovation, contributes to the collapse.

* * *

4. Collapse does not include settling, cracking, shrinkage, bulging or expansion.

Commercial Lines Policy, Common Policy Declarations, Policy Number CPP2520800, CAUSES OF LOSS - SPECIAL FORM, at 2-3 & 6.

On or about August 3, 2005, Hudson purchased the building that is the subject of this litigation. Hudson alleges that, on or about August 23, 2005, the contractor hired by Hudson was working in the building stripping sheetrock and other finishes from the building's brick wall and knocking down partition walls, in order to renovate first and second floor spaces. According to Ibrahim Safakamal, the owner of the construction company hired by Hudson, late in the afternoon of August 23, 2005, his son-in-law, who was a subcontractor on the job, informed him that he had discovered a joist hanging below the ceiling of the first floor space. Safakamal went back to the building the next day and he and his workers continued to remove debris from the building for five or six hours. Deposition of Ibrahim Safakamal, at 14-18. When he was removing a partition wall he saw "something like a

poof" and some movement in the floor joist. *Id.* at 19. He also heard a noise and saw dirt come out. *Id.* at 28. According to Safakamal, the mortar looked like dirt. *Id.* at 29. Safakamal further stated that he saw "more fresh wood" and concluded that one of the joists had continued to break. *Id.* at 28. When Safakamal saw the movement in the joist, he stopped the work and called the Fire Department. *Id.* at 19. The building was evacuated by the Fire Department and the Building Department and was shored up by a contractor hired by the Building Department by the next day. *Id.* at 21 & 36.

Hudson submits the affidavit of David Reyhan, a licensed professional engineer who performed site visits to the building, on or about June 28, 2005 and July 8, 2005, in connection with Hudson's plans to purchase the building. According to Reyhan, at the time of his site visits, the north load-bearing brick wall and other walls were hidden from view by shelves, sheetrock and other finishes. Reyhan states that, at the time of his visits, the building appeared to be in good condition but required maintenance as would be expected for a building of its age.

According to Reyhan:

there were cracks in the Building's facade's decorative parging due to shrinkage and expansion that I recommended be addressed for cosmetic reasons. Parging is a thick coat of plaster or mortar for giving a relatively smooth surface to rough masonry or for sealing it against moisture and for cosmetic reasons. In addition, one stairwell had some inactive non-

structural cracks that I again recommended be addressed for cosmetic reasons.

The cracks indicated that the Building had experienced some movement over time, as would any building of such age.

Affidavit of David Reyhan, dated June 16, 2008, ¶¶ 7-8.

According to Reyhan, on August 23, 2008, "the building had suffered a substantial impairment of its structural integrity and was in danger of complete collapse." *Id.*, ¶ 16. Reyhan also states:

It is further my opinion within a reasonable degree of professional certainty that, until they were removed, the partition walls and framing, which were not designed to be load bearing, would have provided support to the structure after wooden beams supporting the floor fell out of their beam pockets.

Id., ¶ 17.

Hudson also submits the affidavit of Darius Toraby, registered architect and principal of the firm Darius Toraby Architects, who states that when he visited the building on August 3, 2005 and took photographs of the building, he did not see any structural cracks in the building's Christopher Street facade. He states that when he again visited the building, on or about August 23, 2005, he saw structural cracks that he did not see on his prior visit, concluding that the structural failure to the wall occurred on or about August 23. Affidavit of Darius Doraby, dated June 16, 2008, ¶¶ 3 & 4.

According to Tower, however, even prior to its purchase of

the building, Hudson was put on notice that the building was poorly maintained and that the Christopher Street wall had considerable cracking and settling. Quoting a report prepared by Kenneth O. Wille & Assocs., Inc., for Astoria Federal Savings, Tower contends that Hudson's engineer had informed Hudson that he had observed wall cracks that "were 'evidence of significant structural deterioration or failure.'" Defendant's Memorandum of Law In Support of Tower Insurance Company of New York's Motion for Summary Judgment at 2. Tower also states that the Wille report found that the stairway adjacent to the Christopher Street wall was sloping and that there were significant cracks in that area, and that the engineer who authored the report was concerned that settlement and movement in the building were continuing and pervasive and needed to be monitored.

Although the quoted language is contained in Wille's report, when read in context, it appears to have a far different meaning than that attributed to it by defendant. In discussing the exterior walls, the report states:

Considering the age of the building, the exterior walls are in acceptable condition. The brick masonry does exhibit some weathering, minor cracks and limited areas of dislodged mortar. ... Although, not an immediate need, there will be a need for some masonry repairs during the next several years.

Property Condition Report, at 7. The report's summary states:

Overall, the building was found to be in generally satisfactory condition. Other than the wall cracks, the building exhibits no evidence of significant

structural deterioration or failure.

Id. at 13.

With respect to the stairs, although the report did mention deflection and settlement "which appears to have existed for a long period of time" (*id.* at 6), the report merely stated that the building structural system and stairs "should receive regular periodic inspections to determine of [sic] movement is continuing or is a pervasive condition. Repairs should be accomplished as needed." *Id.* However, rather than finding poor maintenance and a dilapidated condition, as Tower contends, the report states that:

[t]he building exhibits various deficiencies, which are described in the body of this Report. During the past 10 years, the building has received new windows, replacement heating boiler (and domestic water heater), and some kitchen and bathroom upgrades. The major building components and public areas appear to be adequately maintained. We did not observe evidence of any significant deferred maintenance.

Id. at 2.

Tower notes that plaintiff's appraiser, Michael J. Weinberg & Assocs. found that "some of the staircases sloped to one side and we observed a vertical crack in the hallway wall between the second and third floors." Appraisal of 500 Hudson Street a.k.a 130 Christopher Street, at 17. However, rather than concluding that the building received poor maintenance and was in a dilapidated condition before plaintiff purchased it, that same

report concluded that "the building received average maintenance." *Id.*

Tower submits the affidavit of George Rycar, an architect hired in 2000 by the prior owner of the building to develop a plan to stabilize the building. Rycar states that at the time that he inspected the building,

the over 100 year old premises ... evidenced signs of wear and tear and a lack of maintenance. Specifically, I noticed cracking and displacement of the exterior brick walls that required repair. ... The planned work consisted of necessary structural repairs to both the exterior walls on the Christopher Street and the Hudson Street sides of the building.

Affidavit of George Rycar, dated January 24, 2008, ¶¶ 4 & 5.

According to Rycar, the building required significant structural repair work which was not done by the prior owner, because of financial considerations.

Tower also submits the affidavit of an engineering consultant, Henry R. Naughton, who inspected the building on November 30, 2005, and reviewed the reports and photographs prepared by the various other architects and engineers.

According to Naughton, the slight bulging in the Christopher Street wall between the first and second floors that he observed on November 30, 2005, was indicated in photographs taken by Wille on July 20, 2005, and in the architectural drawings of Hudson's architect, Toraby.

Naughton states that, in the photographs, he noticed that

the joists between the first and second floors had been sistered (a technique to reinforce joists by securing additional wood to them). According to Naughton, the fact that the joists had been sistered by the prior owner indicates that the cracking and bulging in the Christopher Street wall had predated the purchase of the building by Hudson.

Finally, in his reply affidavit, Naughton contends that it was not the removal of the partitions that caused the Christopher Street wall to bulge, but rather that the previously existing bulge had caused the joists to fall from their pockets.

According to Tower, the loss is not covered, because it results from wear and tear, faulty maintenance, and problems which occurred prior to the policy period.

Furthermore, according to Tower, because under the policy settling, cracking and bulging do not constitute collapse, the damage to the building does not constitute a collapse and is not covered by the policy.

Hudson argues, on the basis of the affidavits and reports of David Reyhan, Darius Toraby, and Kenneth O. Wille & Assocs., and the deposition of Ibrahim Safakamal, that the damage occurred on or after August 23, 2005, when the partitions were removed, and the joists were no longer supported. With respect to the "sistered" joists, Reyhan states that, rather than indicating that the bulging condition predated the events of August 2005,

destruction did not occur to the building at issue here.

Hudson argues, however, that under New York law, the definition of collapse is more flexible, encompassing "a substantial impairment of the structural integrity of a building" (*Royal Indem. Co. v Grunberg*, 155 AD2d 187, 189 [3d Dept 1990]).

In *Dalton*, which is relied on by Tower, the federal court interpreted a decision of the Court of Appeals, *Graffeo v U.S. Fidelity & Guar. Co.* (14 NY2d 685 [1964]), dismissing a motion for leave to appeal, as establishing a narrow definition of "collapse" under New York Law. In *Graffeo*, the concrete slab on which a split-level house rested, settled, resulting in the interior walls of the house pulling away from the ceiling, and creating crevices, as well as a four-inch separation between the slab and the moldings. Nowhere in the decision, however, does the Court indicate whether the damages were primarily cosmetic or whether they constituted a substantial impairment of the structural integrity of the house. The Appellate Division, Second Department, decision, which was left standing by the Court of Appeals, merely concluded that a minority view "which construes 'collapse' as a 'sinking, bulging, cracking, pulling away of the wall'" (*Graffeo v U.S. Fidelity & Guar. Co.*, 20 AD2d 643, 644 [2d Dept 1964][citation omitted]), if applied to the *Graffeo* facts, would do violence to other policy provisions, such as the exclusion of coverage for settling. In so concluding, the

Court noted that the Appellate Division, Third Department had "interpreted the 'collapse' of a building as used in an insurance policy to include 'an element of suddenness, a falling in, and total or near total destruction.'" *Id.* More recently, however, the Appellate Division, Third Department, has interpreted the term "collapse" more broadly, concluding that

determining whether a collapse has occurred rests largely on the degree of damage. In the view of a numerical majority of American jurisdictions, a substantial impairment of the structural integrity of a building is said to be a collapse.

Royal Indem. Company v Grunberg, 155 AD2d at 189 (citations omitted). See also *Nemier v Liberty Mutual Fire Ins. Co.*, 289 AD2d 1053 (4th Dept 2001) (citing *Grunberg* and finding that plaintiffs had established that their living room collapsed when a corner of the living room sank several inches).

Particularly given the more recent interpretations of the term "collapse" by New York courts, this court is not inclined to agree with the interpretation of New York law by the United States Court for the Eastern District of New York. Rather, this court is inclined to follow the more flexible approach of the Appellate Division, Third Department, that would include "a substantial impairment of the structural integrity of a building." *Royal Indem. Company v Grunberg*, 155 AD2d at 189.

Tower also asserts that the cracking and bulging which occurred do not constitute a collapse under the policy, and

therefore, are not covered. It does not appear that the courts of New York have addressed the question of whether cracking and bulging which are incident to the substantial impairment of the structural integrity of the building preclude coverage under a policy such as that in issue here. This court is inclined to agree with those jurisdictions that have concluded that where a collapse has occurred, the fact that cracking and bulging also occur should not prevent coverage for collapse, since it would be hard to imagine a collapse that did not include some cracking or bulging of walls. See *American Concept Ins. Co. v Jones*, 935 F Supp 1220, 1227 (D Utah 1996); *401 Fourth St., Inc. v Investors Ins. Group*, 583 Pa 445, 460, 879 A2d 166, 174 (2005).

That, however does not resolve the matter, because factual questions remain, which cannot be resolved by this court on motions for summary judgment, as to whether the structural integrity of the Christopher Street wall, and therefore, the building, was in fact substantially impaired, and furthermore, whether that impairment occurred during the term of the insurance policy as a result of hidden decay, as Hudson contends, or was a pre-existing problem, resulting from years of poor maintenance and known by Hudson, as Tower contends.

Nor is this matter resolved based upon the principle of issue preclusion, based upon the notice of violation issued by


not prevent coverage for collapse since it would be hard to imagine a collapse that did not include some cracking or bulging of walls. See *American Concept Ins. Co. v Jones*, 935 F Supp 1220, 1227 (D Utah 1996); *401 Fourth St., Inc. v Investors Ins. Group*, 879 A2d 166, 174 (2005). Nevertheless, there are numerous factual questions, such as whether the structural integrity of the building was in fact substantially impaired and, if so, whether that impairment occurred during the term of the insurance policy as a result of hidden decay, as Hudson contends, or was a pre-existing problem resulting from years of poor maintenance and known by Hudson, as Tower contends, which precludes summary judgment.

Accordingly, in motion sequence number 004, Tower's motion for summary judgment is denied. In motion sequence number 005, Hudson's motion for partial summary judgment is denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on December 23, 2008 at 10:00 a.m. to pick a trial date.

The foregoing constitutes the decision and order of the court.

Dated: New York, New York
November 20, 2008



MARYLIN G. DIAMOND
J.S.C.

FILED
DEC 05 2008
COUNTY CLERKS OFFICE
NEW YORK