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

Index Number : 113846/2006

ATLANTIC MUTUAL INSURANCE

VS.

GREATER N.Y. MUTUAL INSURANCE

SEQUENCE NUMBER : 001

PARTIAL SUMMARY JUDGMENT

cs

PART 7

INDEX NO. _____

MOTION DATE 11/10/08

MOTION SEQ. NO. _____

MOTION CAL. NO. 5

The following papers, numbered 1 to 4 were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-E	1-2
Answering Affidavits — Exhibits A-J	3
Replying Affidavits — Exhibits A-C	4

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision, Order and Judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 2/25/09

_____ J.S.C.

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

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 7

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ATLANTIC MUTUAL INSURANCE COMPANY,

Index No. 113846/06

Plaintiff,

Decision, Order and Judgment

- against -

GREATER NEW YORK MUTUAL INSURANCE COMPANY, PENMARK REALTY CORPORATION, 40 EAST 80 APARTMENT CORPORATION, SELWIN R. SILVER, BARBARA NAFISSIAN, JAY B. FISCHOFF, BENJAMIN S. KLAPPER, MIRIUM H. WEINGARTEN, STEPHEN A. MARSHALL, BRAD BUTLER, JANET GREENSBURG BAKER, and NORMAN BAKER,

Defendants.

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HON. MICHAEL D. STALLMAN, J. :

Plaintiff Atlantic Mutual Insurance Company (Atlantic) moves for partial summary judgment in an action seeking a declaration that defendant Greater New York Mutual Insurance Company (Greater New York) is obligated to defend its insureds in an underlying action.

BACKGROUND

Atlantic alleges that it issued a policy of insurance to 40 East 80 Apartment Corporation (Co-Op), the Co-Op's individual board members, and its managing agent, Penmark Realty Corp. (Penmark) (together, the Insureds) for bodily injury and property damage for the period January 1, 2003 to January 1, 2004.[1] Subsequently, Greater New York issued successive yearly policies covering the

[1] Atlantic has not provided a copy of its insurance policy.

Insureds for the periods beginning January 1, 2004, and continuing until January 1, 2007. *See* Notice of Motion, Ex. C., Greater New York policy for period January 1, 2004 to January 1, 2005.

In an action entitled *Baker v 40 East 80 Apartment Corp.*, Index No. 603683/03 (the underlying action)(Notice of Motion, Ex. A, Second Amended Complaint), tenants of the Co-Op (Tenants) sued the Insureds for property damage stemming from water infiltrating into their apartment during several discrete episodes, occurring in different parts of the apartment, at different dates. The first event occurred in July 2003, in which Tenants claimed that water damage to the apartment caused a "severe mold condition" in the apartment, which they were required to ameliorate. The Tenants claim that they were required to vacate the premises until September 2003, while the mold condition was apparently successfully remediated. The Tenants maintain that, even after the Insureds were advised of the conditions, and even after the Insureds' own expert recommended that certain repairs be made to the building's exterior, the Insureds failed to make any repairs.

Commencing in September 2004, and continuing through December 2004, several more incidents of water damage occurred following severe rainstorms. The Tenants allege in their complaint that they were forced to remove themselves from the premises on several occasions, at great cost, and that the Fire Department eventually had the electricity turned off in the apartment, and issued

violations to the Insureds. The Tenants complain that, although the Insureds have detailed knowledge of the nature of the defects in the building's exterior, they continue to ignore the Tenants' pleas that repairs be made.

Atlantic, pursuant to its policy, took on the defense of the Insureds in the underlying action. It maintains, however, that Greater New York has a duty to defend the Insureds in the underlying action for damages which were allegedly sustained from 2004, when Greater Mutual's policy allegedly came into play. In this action, Atlantic seeks a declaration that Greater New York bears that duty to defend, and also a duty to reimburse Atlantic for defense costs incurred to date.

The Insureds tendered their claim to Greater New York in April 2006, seeking coverage and a defense in the underlying action. Greater New York disclaimed, based on (1) the lack of coverage for any incidents of water infiltration occurring before 2004; (2) the claim that the Tenants did not suffer any damage to "owned-property" under the Greater New York policy, due to the three incidents of water infiltration in 2004, because only property belonging to the Co-op was damaged; (3) the claim that any mold damage following in 2004 was a "continuation, change or resumption" of a "known loss" (or, a "loss in progress") commencing prior to 2003, without the policy period (Notice of Motion, Ex. D); and (4) that the Insureds are excluded from expectations of coverage due to

the fact that the Tenants' damages were "expected or intended" by the Insureds, under a policy exclusion, when the Insureds failed to make the necessary repairs.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Canter*, 64 NY2d 851, 853 (1985). Upon a proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material issues of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

"It is well settled that an insurance company's duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is 'exceedingly broad' and an insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest ... a reasonable possibility of coverage.'" *Automobile Insurance Company of Hartford v Cook*, 7 NY3d 131, 137 (2006), quoting *Continental Casualty Company v Rapid-American Corp.*, 80 NY2d 640, 648 (1993); *see also Incorporated Village of Cedarhurst v Hanover Insurance Company*, 89 NY2d 293, 298 (1996)("[i]f the

complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend [interior quotation marks and citation omitted]"). It is "immaterial" that the underlying action asserts additional claims "which fall outside the policy's general coverage or within its exclusory provisions [internal quotation marks and citation omitted]." *Town of Massena v Healthcare Underwriters Mutual Insurance Company*, 98 NY2d 435, 444 (2002). Finally, "[a]ny doubt as to whether the allegations state a claim covered by the policy must be resolved in favor of the insured as against the insurer." *George Muhlstock & Company v American Home Assurance Company*, 117 AD2d 117, 122 (1st Dept 1986); *see also Suburban Bindery Equipment Corp. v Boston Old Colony Insurance Company*, 150 AD2d 767 (2d Dept 1989).

Greater New York cannot evade its obligation to defend the Insureds by claiming that the Tenants have only complained about damage to parts of the building which belong to the Co-op. While the Tenants complain of, among other things, damage to walls, floors, and electrical circuits, which are arguably not their "property" as Lessees under a cooperative lease, the complaint is written broadly enough to encompass the possibility of damages to the Tenants' own property which has not yet been specified.[2] As

[2] The Notice of Motion contains a "Schedule of Damages" (Ex. B), which includes both estimated costs to "Reconstruct Interior of (continued...)

such, the complaint is broad enough to "'suggest ... a reasonable possibility of coverage'" (*Automobile Insurance Company of Hartford v Cook*, 7 NY3d at 137), and broad enough to require Greater New York to defend the Insureds in the underlying action.

It is uncontested that Greater New York has no obligation to defend the Insureds for damages occurring to the Tenants before 2004. However, Greater New York cannot claim that the mold damage which allegedly ensued following the 2004 inundations was a "loss in progress" or "known loss" under its policy, because no one disputes the fact that the 2003 mold condition was remediated, and that Tenants returned to a mold-free apartment before the 2004 incidents. Mold produced as a result of the 2004 incidents was not a continuation of the mold condition from 2003, but was a new condition arising from several new and discrete incidents of water infiltration occurring within the policy period. Therefore, Greater New York cannot evade its duty to defend the Insureds for the 2004 incidents by use of an exclusion for "known loss" or "loss in progress."

Greater New York invokes its exclusion for damages "that you either expected or intended from the standpoint of the insured." Notice of Motion, Ex. D, referring to Greater New York Policy, Ex.

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[2](...continued)
Apartment," and "Damages to and replacement of Home Goods/Furnishings." The provenance of the document has not been established.

C. Greater New York maintains that, because the Insureds knew that the flooding was occurring, and knew that repairs needed to be made, yet failed act, they consequently intended or expected that the Tenants would continue to be damaged, vitiating Greater New York's obligation to cover the Tenants' losses.

Although the second amended complaint alleges, in part, that the Insureds acted "willfully and purposefully" in failing to effect the required repairs (Second Amended Complaint, ¶ 1), the Tenants sue the Insureds for "negligently, carelessly and unreasonably ... failing to undertake" the repairs. *Id.*, ¶ 75. In fact, the third, fourth, and fifth causes of action allege negligence.

"When an exclusion clause is relied upon to deny coverage, the burden rests upon the insurance company to demonstrate that the allegations of the complaint can be interpreted only to exclude coverage." *Town of Massena v Healthcare Underwriters Mutual Insurance Company*, 98 NY2d at 444. Since it has been held that, where a complaint contains allegations of negligence, it cannot be found to be "subject to no other interpretation" than that the insureds "expected" or "intended" harm to their insureds (*Automobile Insurance Company of Hartford v Cook*, 7 NY3d at 138), the complaint in the underlying action can be read other than to exclude coverage, and Greater American cannot avoid defending the Insureds under this exclusion.

Greater New York complains that it has not received discovery from Atlantic which might make a difference in determining its obligation to defend the Insureds, such as information which might show whether the Tenants incurred damage to their own property, and so, seeks to defeat the present motion under CPLR 3212 (f). The court notes that Greater New York has not cross-moved for discovery.

Among other things, Greater New York demands a copy of Atlantic's policy. However, Greater New York's obligation to defend Insureds arises from "the four corners of the complaint," and not Atlantic's policy (*see Fitzpatrick v American Honda Motor Co., Inc.*, 78 NY2d 61 [1991]), and Greater New York cannot "look beyond the complaint's allegations to avoid [its] obligation to defend" the Insureds. *Id.* at 66. Therefore, discovery is not necessary to determine Greater New York's obligation to defend the Insureds. Discovery can be had in the balance of the action remaining.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff Atlantic Mutual Insurance Company's motion for partial summary judgment is granted; and it is further

DECLARED and ADJUDGED that defendant Greater New York Mutual Insurance Company is obligated to provide a defense to the defendants in the underlying action *Baker v 40 East 80 Apartment*

Corp., Index No. 603683/03; and it is further

ADJUDGED and DECLARED that Greater New York Mutual Insurance Co. is obligated to reimburse Atlantic Mutual Insurance Company for its proportionate share of defense costs incurred thus far, and to be incurred, by Atlantic Mutual Insurance Company; and it is further

ORDERED that the above judgments are severed and that the remainder of the action shall continue; and it is further

ORDERED that the parties shall appear for a preliminary conference May 14, 2009 at 9:30 AM in IAS Part 7.

Dated: February 25, 2009
New York, New York

ENTER:

J.S.C.