SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 47**

JOSEPH WEISER and THE JUDE THADDEUS GLEN COVE MARINA I, INC.,

Plaintiff,

-against-

FEDERAL INSURANCE COMPANY,

Defendants.

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INDEX NO.: 017565/07

MOTION DATE:8-19-09
SUBMIT DATE:10-8-09
SEQ. NUMBER - 001

MOTION DATE: 10-8-09
SUBMIT DATE: 10-8-09
SEQ. NUMBER - 002

The following papers have been read on this motion:

Notice of Motion, dated 7-22-09.....1
Notice of Cross Motion, dated 9-10-09.....2
Defendant's Memorandum of Law in Support, dated 7-22-09.....3
Plaintiff's Memorandum of Law in Opposition to Defendant's Motion and In Support of Plaintiff's Cross Motion, dated 9-10-09.....4
Affirmation in Opposition to Cross Motion and in Reply, dated 10-1-09.....5
Defendant's Memorandum of Law in Opposition to Cross Motion and In Reply, dated 10-1-09.....6
Reply Affirmation, dated 10-7-09.....7

This motion by the defendant pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted. The cross motion by the plaintiffs pursuant to CPLR 3212 for summary judgment on their complaint is denied.

This is an insurance coverage action stemming from damage to a bulkhead at the plaintiffs' marina, which is located in Glen Cove, New York. It is undisputed that this bulkhead was made of steel sheeting and securing tie rods, and ran along a stretch of land abutting the water on the plaintiffs' property for several hundred feet. [1] There is a dispute as to how this bulkhead should be defined for purposes of the policy, but it is uncontradicted that a least one of its functions was to hold back the earth to prevent it from falling into the water. On April 15, 2007 a vessel stored on the land slipped off its elevated platform/stand and struck an adjacent vessel similarly stored. This began a chain reaction, and five vessels fell against the bulkhead, bowing it out towards the water and causing serious damage. There was a partial collapse of the earth behind it. The defendant declined to pay for the damage to the bulkhead on the ground that the bulkhead was not property covered by its policy. This law suit ensued.

On its motion for summary judgment the defendant insurer asserts that each of the two causes of action alleged in the complaint must be dismissed. The first is for breach of the insurance contract, the second for coverage based on the principle of equitable estoppel. The plaintiffs cross move for partial summary judgment declaring that the defendant is liable under the policy and must pay on the property damage claim they made.

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[1] The parties to not specify the length, although plaintiff Joseph Weiser estimated the figure at between 300-400 feet.

Initially, the Court rejects the defendant's contention that the cross motion should not be considered as untimely. The defendant's motion was made timely and the issues to be addressed by the Court on the cross motion already are squarely before it; moreover, given the identity of such issues the Court is empowered to grant summary judgment to the cross movants even if no such motion had been made. CPLR 3212(b); *see, Grande v Peteroy,* 39 AD3d 590, 592 (2d Dept. 2007). Accordingly, the cross motion will be considered.

The Court also disagrees with the defendant that the assertion of the second cause of action constitutes an admission that there is no coverage under the terms of the policy. Parties are allowed to plead in the alternative (CPLR 3017[a]), and the Court retains its traditional power to grant the equitable relief sought in the second cause of action in any event. CPLR 3217[a]; *see, State v Barone,* 74 NY2d 332, 336 (1989). Nevertheless, for the reasons set forth below it agrees with the defendant that no basis for coverage exists under either theory.

The Court finds that the policy at issue was the one annexed to the defendant's moving papers as exhibit "G", is acknowledged as being so by counsel for plaintiffs at paragraph 21 of his affirmation in support of the cross motion, and plaintiffs have not been able to demonstrate that any other paper they offer in opposition to this motion or in support of their cross motion constituted the policy, a part thereof, or had any effect on the rights and obligations of the parties to the insurance contract reproduced by the defendant. *See, Springer v Allstate Life Ins. Co.,* 94 NY2d 645 (2000). This policy and all its terms were effective on the date of the loss.

The policy provides, among other things, that coverages "apply only at those

premises for which a Limit Of Insurance applicable to such coverages is shown in the Declarations" for physical damage caused to a "building or personal property, caused by a peril not otherwise excluded, not to exceed the applicable Limit of Insurance for Building Or Personal Property shown in the Declarations." In the Declarations portion of the policy, two buildings were noted, one insured to a limit of $185,000 (described by plaintiff Joseph Weiser in his examination before trial as the office building), and another for $500,000 (which he described as the restaurant building).

Under the Declarations section the specific "Premises Coverages" and "Property Coverages" are set forth, with the maximum amount that will be paid for each. There is no mention of a bulkhead, nor is there any limit of insurance described for any other building other than the two previously mentioned. In the Definitions section of the policy, a "Building" is defined as a "structure; building components; completed additions; additions to the structure under construction; and alterations and repairs to the structure." Under this section is also found the converse: "Building does not mean: ... retaining walls..." The policy also contains a standard clause that it can be changed only by way of a written endorsement signed by one of the insurer's authorized representatives.

Upon review, the Court finds that the foregoing is unambiguous, and therefore its plain meaning must be given effect. *Sanabria v American Home Assur. Co.,* 68 NY2d 866 (1986); *Bassuk Bros., Inc. v Utica First Insur. Co.,* 1 AD3d 470 (2d Dept. 2003); *see also, R/S Assoc. v Job Dev. Auth.,* 98 NY2d 29 (2002); *W.W.W. Assoc. v Giancontieri,*

77 NY2d 157 (1990). A court may not disregard clear policy language to find an ambiguity where none exists. *Bassuk Bros., Inc. v Utica First Insur. Co.,* 1 AD3d at 471; *Acorn Ponds v Harford Ins. Co.,* 105 AD2d 723 (2d Dept. 1984). Accordingly, the first cause of action, which is based on an alleged breach of that policy, presents a question of law for the Court. *Vigilant Ins. Co. v Bear Stearns Companies, Inc.,* 10 NY3d 170 (2008).

The Court finds that given the clear statement that coverage applies only at those premises "for which a Limit Of Insurance applicable to such coverages is shown in the Declarations" and exists for "building or personal property... not to exceed the applicable Limit of Insurance... shown in the Declarations", only those items for which a monetary coverage limit is stated are covered. The interpretation necessary to enable the plaintiffs to be paid for the bulkhead would be that an item that was not listed would still be covered notwithstanding its absence from the Declarations – and without a monetary limit. This is a reading that does not comport with common sense, nor with the obvious intent of the insurer to set a maximum amount for which it would be responsible in the event of a covered loss.

Plaintiffs point to a provision that reads, "...the loss or damage must: be caused by a peril not otherwise excluded; and occur at or within 1,000 feet of the premises shown in the Declarations." However, this is introduced by the first quoted portion of the language noted above, that coverages apply "only at those premises for which a Limit Of Insurance applicable to such coverages is shown in the Declarations." The plaintiffs'

contention that coverage exists as the bulkhead was within the 1,000 feet stated in the Declarations is untenable because, again, a bulkhead is simply not shown as covered property with a limit of insurance. This provision does sets forth a requirement for coverage, but the property itself must still be found in the Declarations as being among those items that are covered, and the bulkhead is not.

More specifically, in the Declarations subsections denominated "Premises Coverages" and "Property Coverages" the policy provides a list of covered items and the limits of insurance for each. Two specific buildings are listed, identified as # 1 and # 2, and as noted above plaintiffs acknowledged that they were the office and restaurant on the property. However, a marina bulkhead, or anything else that by its use might arguably double as bulkhead, such as a "wharf" or a "dock," is not among these described covered items.

In addition, a "retaining wall" was specifically not to be defined as a "building" or "personal property" under the policy, and one definition of a "bulkhead" is a retaining wall along a waterfront. Merriam Webster's Collegiate Dictionary 150 (10th ed. 1994); *see also, Matter of Brotherton v Department of Envtl. Conservation of State of N.Y.,* 189 AD2d 814, 815 (2d Dept. 1993) [" a bulkhead (i.e., retaining seawall) separated petitioner's property..."]. No other definition of a bulkhead is offered by the plaintiffs that might bring it within the ambit of any other structure or property identified by the policy in its Declarations. Indeed, one undisputed purpose of the bulkhead at issue in this case was to hold back the earth on the land side of the wall, and it also is undisputed that a partial collapse of the land behind it did in fact occur after the accident. The damaged

structure thus clearly was a retaining wall, irrespective of possible alternative names used by those who were familiar with marinas, or this marina in particular.

Whether or not the plaintiffs reasonably might have been confused as to whether the bulkhead constituted a "retaining wall" for purposes of the policy, as their counsel contends, the policy and its plain language control, and must lead to the conclusion that the bulkhead was not covered. The Court therefore concludes that under the policy the damaged bulkhead was not a covered item of property, and no coverage for damage to it exists. Accordingly, the first cause of action alleging breach of the contract of insurance by the defendant for its failure to provide coverage for damage to the bulkhead must be dismissed.

The second cause of action sounds in equitable estoppel, based on the payment by defendant in 2005 of a damage claim involving the plaintiffs' "docks, piers and wharves" (Complaint, ¶16). These docks, like the bulkhead at issue in the present case, are not to be found among the listed items for which coverage exists. Defendant essentially admits that this payment was made in error. The plaintiffs contend that in reliance on this payment, and the fact that the policy at issue in this matter was a renewal of, and in all respects identical to, the one in force at the time of the earlier occurrence and payment, they were mislead into not seeking separate or additional coverage for the bulkhead.

Under well-established law, estoppel cannot be used to create coverage where none exists. *Zappone v Home Ins. Co.,* 55 NY2d 131 (1982); *Liberty Mut. Ins. Co. v McDonald,* 6 AD3d 614 (2d Dept. 2004); *Metropolitan Prop. & Cas. Ins. Co. v Pulido,* 271 AD2d 57 (2d Dept. 2000); *Sena v Nationwide Mut. Fire Ins. Co.,* 224 AD2d 513 (2d

Dept. 1996). This is the case even where an insurer states that coverage existed when it did not (*Ward v County of Albany,* 34 AD3d 1288 [4th Dept. 2006]) , or when an insurer's alleged agent seemed to have arranged to provide a party with coverage, when it had not. *See, American Ref-Fuel Co. of Hempstead v Resource Recycling, Inc.,* 248 AD2d 420 (2d Dept. 1998). The only exception to this rule appears to be in the liability defense area, where a purported insured surrenders the right to control its defense to a carrier, which, without a prior reservation of its rights to do so, later seeks to withdraw on the ground that there never was coverage. In such a case, equity may estop the insurer from abandoning the affected party. *See, Schiff Assocs. v Flack,* 51 NY2d 692, 699 (1980); *Gen. Acc. Ins. Co. of America v Metropolital Steel Industries, Inc.,* 9 AD3d 254 (1st Dept. 2004). Nothing akin to this scenario exists in the present case, however.

Here, the key act of the insurer stressed by the plaintiffs was to pay a 2005 claim it now claims it could have denied. This cannot form the basis for an estoppel, as there can be no justifiable reliance where a reading of the policy would have made it clear that the earlier payment had been made in error or, at minimum, was subject to question. A party is always deemed to have read the policy at issue, and such a reading should have put the plaintiffs on notice that the bulkhead would not be covered in the event it was damaged. This eliminates the erroneous payment, as well as any other alleged inducements or representations pointed to by the plaintiffs, as a source of any justifiable reliance. [2]

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[2] This is not to say that the Court finds any such misrepresentations were made by the defendant or any agent for the purpose of having the plaintiffs renew the policy, but rather reflects the general rule that on summary judgment the record is to be read favorably to the motion opponent. *See, Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003).

Rotanelli v Madden, 172 AD2d 815 (2d Dept. 1991).

Accordingly, the second cause of action cannot be sustained. The defendant's motion is granted in its entirety, and the complaint is dismissed.

The cross motion is denied for the reasons set forth above, and the Court declares that no coverage exists for the damage to the bulkhead property under the policy issued to the plaintiffs by the defendant, and that the defendant therefore is not obligated to pay the claim made under such policy.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: October 26, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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