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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 600467/2006

RICHMAN, GAYLE GRENADIER

VS.

HARLEYSVILLE WORCESTER INS.

SEQUENCE NUMBER : 010

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 per attached

FILED
DEC 01 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/19/09

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
----------X

GAYLE GRENADIER RICHMAN,

Plaintiff,

Index No. 600467/06

-against-

HARLEYSVILLE WORCESTER INSURANCE COMPANY, ALEXANDER WALL CORPORATION and ALL CLEANING, A.V., INC.,

Defendants.

EMILY JANE GOODMAN, J.S.C.:

Motion sequence numbers 010 and 011 are consolidated for disposition.

In this action seeking insurance coverage and damages resulting from a raccoon infestation and alleged faulty remediation, as well as for conversion, defendant Harleysville Worcester Insurance Company (Harleysville) moves for summary judgment dismissing the complaint and any cross claims against it (motion sequence number 010), and defendant Alexander Wall Corporation (Alexander Wall) moves to dismiss the complaint and cross claims, or, alternatively, dismissing plaintiff's claims for environmental damage, for damages to her personal property, and for conversion (motion sequence number 011).

FACTS

Richman's house, located in East Hampton, New York, became

infested with raccoons in July 2004. She called a pest control expert, and notified her insurer, Harleysville, of the infestation. Richman's claim was initially handled by Harleysville's Central Claims Unit (the CCU) in Pennsylvania, but was then transferred to property claims specialist Cheryl McLaughlin, who worked out of Worcester, MA, when it became clear that the damage would exceed $10,000.00. Harleysville opened a claim, assigned a claim number, and retained Alexander Wall to inspect the home, evaluate the damage, and prepare an estimate. Alexander Wall is a construction and emergency service provider approved by Harleysville to render services to its insured customers. Jim Hall, of Alexander Wall, went to the house, and met with Richman. A CCU adjuster was advised that Alexander Wall was equipped to do the type of clean-up needed, and Richman agreed to allow Alexander Wall to do the clean-up. She wanted an independent adjuster to write the estimate for repairs, however. Harleysville assigned Mr. Schepis for full adjustment, and was advised by Mr. Schepis that the clean-up had to be done before the inspection could be completed. Prior to the clean-up, the raccoons had to be trapped and removed from the home. That was completed in September 2004.

When Hall went to the home to inspect, he prepared an estimate based upon the visual inspection that he was able to do, but he was unable to see the extent of the damage because he

could not assess the damage behind the walls, such as that done to the electrical wiring and duct work. That damage could be inspected only after dry wall was removed, and ceilings were opened up.

Harleysville forwarded a Certificate of Authorization, dated September 23, 2004, to Richman which indicated the name Alexander Wall Corporation "The Resolution Network" on the top, and which authorized Alexander Wall to proceed with the "restoration work required as a result of a/an Raccoon Damage" but noted that "this does not authorize... any new construction." The certificate also provided that Richman assigned the money due from Harleysville to Alexander Wall. In the case notes that she kept in her file, McLaughlin noted that, on October 27, 2004, she received the certificate.

In December 2004, Richman went to the house to remove some personal possessions from two closets that Alexander Wall said might have to be demolished due to the seepage of raccoon urine into the ceiling and walls. When she arrived, she found Alexander Wall in the process of removing everything from the home (called a pack-out), not just the contents of the two closets. According to Richman, Alexander Wall did not have packing materials, and made no preparations to move her baby grand piano or her glass top dining room table. Both were thrown in a dumpster as trash, although the record contains a To Whom It

May Concern letter from Richman stating that she authorized Hall to throw-out the piano and table. Richman states that she tried to stop the pack-out of her home, but she was unsuccessful. She allegedly was told that if the job were stopped, Harleysville would deny her claim. Richman contends that she was never told about the pack-out in advance, and Alexander Wall does not provide any evidence that it informed of the pack-out.[1] Nor do they provide any evidence that she authorized Alexander Wall to move and store her personal property.

When Mr. Schepis inspected the house in December, he discovered that there was far more damage to the home than had first been observed, and, among other things, the kitchen cabinets and sheetrock ceilings would have to be replaced, the attic re-insulated, and redecorating would be necessary. Mr. Schepis recommended a reserve of $100,000 on the building, and $10,000 on the contents.

On January 4, 2005, when Richman returned from being out of the country, her staff told her that Alexander Wall had been making repeated phone calls, demanding that Richman sign a Certificate of Satisfaction, so that it could get paid.

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[1] While Richman acknowledges that one Ray Anderson had previously told her that the contents of the house would have to be removed, when Richman spoke to McLaughlin, McLaughlin allegedly told her that it was not true; the contents would not have to be removed. Richman had no further contact with Anderson.

Alexander Wall called again, and Richman signed and faxed the Certificate of Satisfaction, dated January 4, 2005, despite the fact that she had not been able to see the house to inspect the work. When she was able to go to the house, in March 2005, she states that she discovered that Alexander Wall had caused further damage to her house, and had not cleaned up the premises as it was supposed to do.

In February 2005, Mr. Schepis sent McLaughlin an e-mail saying that Richman had decided to use Alexander Wall to complete the repairs. On February 14, 2005, Harleysville issued a check to Gail Richman and Alexander Wall Corporation in the amount of $43,991.85, "In Satisfaction of Building Damage Loss Less Recoverable Depreciation and $500 Deductible." Richman refused to endorse the check, and disputed the validity of the repair estimate. Richman presented affidavits, in opposition to the motions, that it was not, and still is not, possible to see the full extent of the damage to the home.

McLaughlin sent Richman a sworn statement in proof of loss form, which was already filled in by Harleysville, and stated that the total amount claimed under the policy is $59,979.30. Richman did not sign the form, and disputed the amount.

In May, McLaughlin wrote to Richman demanding that she provide a sworn statement in proof of loss for the cost to repair the house, and identifying her damaged personal property.

Richman's property, at that time, was in the possession of Alexander Wall, which allegedly did not permit Richman to see it, or to remove it, without payment of storage fees. Richman did not return the document, because she could not determine the extent of the damage in the house, or, to her personal belongings since Alexander Wall denied her access to them.

In August, McLaughlin sent Richman a letter saying that she failed to return the sworn statement. Richman sent Harleysville a sworn statement in proof of loss on August 16, indicating that the damage exceeded the policy limits. McLaughlin rejected the sworn statement in proof of loss, and rejected Richman's entire claim, sending the sworn statement back to Richman with the word "REJECTED" written in large letters across the statement.

DISCUSSION

Harleysville posits that Richman's primary contention is that the house presents a health risk due to the supposed presence of baylisascaris procyonis, a bacterium sometimes found in raccoon feces, and that Richman seeks further coverage based upon that damage. Harleysville emphasizes that none of the samples taken from the house (which were admittedly taken long after the raccoons were removed from the house) tested positive for the bacterium. Harleysville misrepresents the crux of the complaint. While Richman does express concern about the presence of dangerous bacteria, her main argument is that Harleysville

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refused to cover the damage caused by the raccoons, and that Alexander Wall caused additional damage to her house and to her possessions. Harleysville also contends that Richman seeks compensation for razing the house and rebuilding it, based upon the possible presence of the bacterium. This, too, is inaccurate. Rather, Richman has an affidavit from a contractor who opines that the damage to the house is so extensive, that it would be more expedient to raze the house and build another rather than to try to repair all of the damage in the house.

Harleysville denies that it employed Alexander Wall to do anything other than provide an estimate of the damages sustained at the property. It contends that Richman hired Alexander Wall, and, therefore, Harleysville has no responsibility for any action that Alexander Wall took at the house. Harleysville maintains that the authorization that Richman signed, allowing Alexander Wall to engage in remediation work, was a contract between Richman and Alexander Wall in which Richman employed Alexander Wall.

Harleysville contends that it asked Richman to provide a sworn statement of loss after she rejected the check it had issued in order to ascertain what additional damages she claimed under the policy. In rejecting Richman's claim, Harleysville relies heavily on Richman's failure to return the sworn statement of loss in a timely manner, and on the fact that when she did

submit the form, she did not have a detailed description of the loss, or the amount that it would cost to repair, nor did she describe the personal property loss. Harleysville contends that Richman cannot establish that the property sustained any direct physical damage as a result of the raccoon infestation beyond that for which she already received compensation. By failing to comply with the policy's requirement that she provide a sworn statement of loss, upon request, Harleysville concludes that Richman is precluded from recovering for breach of the insurance policy.

There is no question that the failure to submit a signed proof of loss within 60 days, as provided by the policy, can be an absolute defense to an action on the policy. However, that is true only in the absence of a waiver or conduct by the insurer that results in an estoppel of the assertion of that defense. *See Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201 (1984).

In this case, the insurance company knew about the damage to the house, and proceeded to send adjusters, hire assessors, and even pay for part of the damage to the house. It also issued a check which it deemed "in satisfaction" of the damage to the house, without requesting a sworn proof of loss. Only when Richman rejected the proffered amount did Harleysville seek a sworn proof of loss statement. While that, in and of itself,

does not mean that Richman was not obligated to submit the form, under the circumstances presented here, there is at the very least a question of fact as to whether Harleysville's request for the sworn statement was in good faith, and whether it had waived its right to such a form. Not only had Harleysville been involved in the assessment of damage and remediation, but it knew that it was impossible to ascertain the full extent of the damage until the remediation was completed. Thus, it knew that Richman could not fill out a detailed sworn statement, because no contractor would give an estimate until the full extent of the damage could be assessed. Further, Harleysville knew that Alexander Wall had possession of Richman's personal property, and Richman had no access to it in order to determine the damage to that property. Should the trier of fact find Richman's position compelling, the trier of fact could conclude that any requirement that Richman submit the sworn statement had been waived, and that Harleysville's request for it was not made in good faith. Thus, Richman has raised an issue of fact regarding whether the failure to submit the sworn statement of loss should preclude her from recovering for the damage to her property.

Harleysville contends that Alexander Wall was an agent of Richman, not of Harleysville, and that, therefore, Harleysville is not vicariously liable for any negligence of Alexander Wall. Harleysville maintains that it retained Alexander Wall only to

provide a written estimate of the damage sustained, not to perform any repairs. Harleysville avers that Richman retained Alexander Wall, by executing a separate written contract for restoration services at her property. Harleysville also relies on the Certificate of Satisfaction that Richman signed, stating that Alexander Wall had completed the restoration to her satisfaction.

Based on the evidence before the court, it is unclear whether Alexander Wall was an agent of Harleysville. The "contract" upon which Harleysville relies is not a contract, but an authorization allowing Alexander Wall to perform certain restoration. Richman states that she was told that she was required to have Alexander Wall perform the initial clean up. Harleysville denies that assertion; however, under the circumstances presented, it is unclear whether Richman was led to believe that she had to permit Alexander Wall to perform the initial clean-up, in order to ascertain the full extent of the damages. As such, there is a question of fact regarding who retained Alexander Wall, which must be determined at trial.

While the Certificate of Satisfaction might ordinarily preclude Richman from challenging the adequacy of the remediation work done by Alexander Wall, here Richman submitted evidence that Alexander Wall pressured her into signing the document before she was able to see the work that had been done. Both she and a

worker in her office submitted affidavits attesting to the harassing nature of Alexander Wall's repeated telephone calls, including Alexander Wall's threat that unless Richman signed the document, Alexander Wall would never return Richman's personal property. Duress consists of a wrongful threat that induces a person threatened to enter a transaction under the influence of fear as precludes the exercise of free will. *See 805 Third Ave Co., v M.W. Realty Assoc.*, 58 NY2d 447 (1983). The issues in economic duress is whether an improper threat was made, without justification, acceded to by the fear of financial distress without other means of relief from the threat. *See Austin Instrument, Inc. v Loral Corp.*, 29 NY2d 124 (1971). The refusal to deliver or release property can constitute duress. *Id.* Thus, the question of whether the Certificate of Satisfaction is dispositive is a matter for the trier of fact to consider.

Alexander Wall contends that there is no evidence that it negligently performed the remediation at Richman's home. Alexander Wall claims that it removed insulation, cleaned and treated the areas where the insulation was removed, treated any areas that had direct contamination, and removed any contaminated drywall. It also removed all ceilings, in accordance with Richman's request. Alexander Wall asserts that all fecal contamination and urine from the raccoons was located in the home's attic, and all precautions were taken to protect the

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integrity of the home, and to prevent other parts of the house from becoming contaminated. Alexander Wall concludes that it left the house in construction-ready condition.

While Alexander Wall's assertions may suffice to establish a prima facie case, Richman has presented evidence that the house was not in construction-ready condition, and that there was fecal contamination in many parts of the house after Alexander Wall completed its work. She also presents evidence that there was further damage to the house. Thus, there is a question of fact as to whether Alexander Wall performed in accordance with its obligations, and whether it left the house in construction-ready condition. Therefore, summary judgment is not warranted.

Alexander Wall also seeks dismissal of Richman's conversion cause of action. It claims that Richman was told that the remediation would require the removal and storage of her personal property, and she knew where the contents of her home were being stored. Further, it maintains that it had authority to remove the home's contents.

Richman presents a very different picture. She maintains that she did not know that the contents would be removed until Alexander Wall started to remove them, and that she never authorized it to remove the contents. Additionally, Alexander Wall does not deny that it has refused to allow Richman access to her belongings. While Alexander Wall states that it would have

permitted such access, the letter upon which it relies required Richman to pay the storage fees that Alexander Wall demands before Richman can even see the condition of her belongings. Thus, Alexander Wall has failed in its burden of demonstrating any entitlement to summary judgment.

Similarly, Alexander Wall's request to dismiss the claim for damage to personal property is without merit. While Richman has not presented evidence of what damage most of her property sustained, Alexander Wall has made such a showing impossible by preventing Richman access to her property. Although Alexander Wall asserts that it carefully wrapped and removed the contents of the home, Richman disputes that assertion, saying that Alexander Wall did not have proper packing materials and was careless in moving her personal property.

Alexander Wall seeks summary judgment on its counterclaim for storage charges. It claims that it has stored Richman's belongings in a climate-controlled facility, and has not been paid since September 2005. In view of the questions regarding Alexander Wall's authority to remove the contents of the home and to charge Richman for storage fees, summary judgment is not warranted.

Alexander Wall seeks dismissal of claims for environmental damages because the tests of Dr. Gilbert, a toxicologist and epidemiologist, did not show any baylisascaris procyonis eggs,

and Dr. Gilbert concluded that the remediation work was conducted appropriately. Further, Richman had the home tested, and also obtained negative results.

Richman does not respond to this branch of the motion in her brief. She submits an affidavit of Robert Leighton, an environmental consultant, who disputes Dr. Gilbert's conclusion that the house was properly remediated. Leighton points out that roundworm eggs were likely to have decayed by the time Dr. Gilbert conducted his tests. He further states that his 2006 inspection of the home revealed the presence of substantial quantities of black mold in the basement. However, Richman did not assert any claim based upon black mold, and the record does not contain any evidence of any other environmental damage caused by Alexander Wall. Therefore, that portion of Alexander Wall's motion seeking dismissal of the claim for environmental damage is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Harleysville Worcester Insurance Company (motion sequence number 010) for summary judgment is denied; and it is further

ORDERED that so much of the motion of Alexander Wall Corporation as seeks dismissal of the claim for environmental damages is granted, and the motion is otherwise denied.

This Constitutes the Decision and Order of Court.

Dated: November 19, 2009

ENTER:

J.S.C.

EMILY JANE GOODMAN