[* 1]

M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - IAS PART 16

BY: KELLY, J

LORRAINE NOONEY, et al,

Plaintiffs,

- against -

TOWER GROUP COMPANIES, et al,

Defendants.

DATED: September 23, 2009

INDEX NUMBER: 15267/2008

MOTION DATE: June 30, 2009

MOT. SEQ. NUMBER 1

Defendant Tower Insurance Company of New York s/h/a Tower Group Companies and Tower Insurance Company of New York has moved for summary judgment dismissing the complaint against it. Plaintiff Lorraine Fulda-Nooney and plaintiff Michael Nooney have cross-moved for, inter alia, summary judgment on the issue of liability.

The plaintiffs own a home located at 83-43 60th Drive, Middle Village, New York. Defendant Tower issued a homeowner's policy to plaintiff Lorraine Nooney covering the premises effective from July 3, 2007 to July 3, 2008. Section 1 of the policy, "Perils Insured Against," provided in relevant part:

> "...We insure for direct physical loss to the property described in Coverages A, B, and C caused by a peril listed below unless the loss is excluded in Section 1. Exclusions.

Under the specific exclusion section of the policy following the written was:

> 2. Windstorm or hail. "This peril does not include loss to the inside of a building or the property contained in a building caused by rain, snow, sleet, sand or dust *unless the direct force of wind or hail damages the building causing an opening in a roof or wall* and the rain, snow, sleet, sand or dust enters through this opening...." (Emphasis added).

On July 17, 2007, contractors hired by the plaintiffs removed the existing roof of the plaintiff's home for the purpose of creating attic

space. Before the contractors completed their work on that day, they placed a tarpaulin over the building to protect it from the elements. Unfortunately, on July 18, 2007, at about 7:00 A.M., rainwater began to pour through the area that had been covered with the tarpaulin cascading into the rest of the house and causing damage. The Nooneys thereafter made a claim under the Tower policy.

The insurer investigated the claim, and by letter dated September 13, 2007, defendant Tower disclaimed coverage on the following ground:

> "Our investigation reveals that the damage sustained to your dwelling resulted from rainwater which leaked through the roof... A tarpaulin had been placed over the building following the removal of the original roof and during the construction of the new roof. The tarpaulin was not properly placed and supported [so] that it would shed water from the tarpaulin surface. As a result, the weight of the rain water that collected on the tarpaulin tore the tarpaulin grommets causing the rain to enter the building. There was no evidence that a properly tied down tarpaulin would have torn at the grommets by the force of the wind.
>
> Since rainwater seepage is not one of the perils listed above, and there is no evidence of direct damage by the force of wind to the building which allowed the water to enter, there is no coverage under your policy for the damage sustained".

The letter did not disclaim coverage on the ground that the tarpaulin did not meet the definition of a roof within the meaning of the policy.

The plaintiffs began this action on or about June 19, 2008 seeking a judgment declaring their rights under the policy and awarding damages for breach of contract. The plaintiffs alleged that the tarpaulin was a temporary roof which the wind blew off, thereby permitting rain to enter the building. Paragraph 16D of the verified complaint states:

> "That the eyewitnesses to the event confirmed that the temporary roofing on top of the premises was blown off within five minutes of the start of the wind and rain storm on July 18, 2007, indicating that the water damage was not 'seepage' but as a direct

result of wind having removed the temporary roof and then allowing a deluge of rainwater to enter thereon...".

Avoiding the disputed issue of whether the tarpaulin failed to protect the building because of the weight of the rainwater or because of the action of the wind, the defendant insurer now moves for summary judgment on the specific ground that the policy does not cover the loss at issue because the tarpaulin was merely a "temporary covering" for the building and not a "roof" within the meaning of the policy. The plaintiffs argue in opposition that the insurer is not entitled to obtain summary relief on this basis as it is either precluded from raising this ground for disclaimer or should be estopped from raising this ground for disclaimer because the insurer did not mention it in its correspondence of September 13, 2007.

A notice of disclaimer "must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated" (General Acc. Ins. Group v Cirucci, 46 NY2d 862, 864; See, Adames v Nationwide Mut. Fire Ins. Co., 55 AD3d 513; Halali v Evanston Ins. Co., 8 AD3d 431). As a general rule, an insurer which denies liability on one ground may not subsequently shift the basis for its disclaimer to another ground known to it at the time of its first denial of coverage (See, Guberman v William Penn Life Ins. Co. of New York, 146 AD2d 8). "An insurer's justification for denying coverage is strictly limited to the ground stated in the notice of disclaimer..." (Shell v Fireman's Fund Ins. Co., 17 AD3d 444, 446; See, Adames v Nationwide Mut. Fire Ins. Co., supra; Pawley Interior Contracting, Inc. v Harleysville Ins. Companies, 11 AD3d 595). "Thus, an insurer waives any ground for denying coverage that is not specifically asserted in its notice of disclaimer, even if that ground would otherwise have merit..." (Adames v Nationwide Mut.

Fire Ins. Co., supra, 515; See, Pawley Interior Contracting, Inc. v Harleysville Ins. Companies, supra; Halali v Evanston Ins. Co., supra).

Despite the foregoing, the defense that a claim falls outside the scope of an insurance policy is not waived by the failure to set forth that ground in a notice of disclaimer (See, Albert J. Schiff Associates, Inc. v Flack, 51 NY2d 692; Perras Excavating Inc. v Transportation Ins. Co., 291 AD2d 643). "[W]here the issue is the existence or nonexistence of coverage (e.g., the insuring clause and exclusions), the doctrine of waiver is simply inapplicable..." (Albert J. Schiff Associates, Inc. v Flack, supra, 698). An insurer's disclaimer on the basis of other policy provisions does not create coverage where it otherwise does not exist (Avon Group, Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa., 235 AD2d 347).

In the case at bar, the defendant insurer has asserted that the damage to the plaintiffs' home was not a covered loss because the policy, by its terms, only provided indemnification for damage to the interior of the building caused by rain where the wind had first created an opening in a roof or wall for the rain to enter. The temporary tarpaulin installed over the building, the defendant insurer further asserts, did not constitute a roof within the meaning of the policy.

Defendant argues that the policy at issue specifically provided coverage for damage originating from "Windstorm or hail". In the case of damage from rainwater, the insurer states that wind must first have created a hole in a permanent roof or walls for coverage to exist.

Such a defense clearly pertains to the extent or limits of coverage provided under the terms of the policy. Therefore, the court finds defendant Tower did not waive the ground by failing to include such grounds in its disclaimer letter dated September 13, 2007 and same must

be addressed.

Reaching the issue of whether the tarpaulin placed on top of the plaintiffs' building comes within the scope of the term "roof" as used in Section 1 of the Tower policy, the court notes initially that neither the research of the attorneys for the parties nor its own research has revealed cases on point arising in New York.

However, there are cases from other jurisdictions which hold that temporary coverings placed on top of buildings do not come within the scope of the term "roof" in insurance policies having clauses similar to the one in the case at bar (See, *e.g.*, Interior Shutters, Inc. v Valiant Ins. Co., 242 F3d 389 [Table], 2000 WL 1879129 [Text] [10th Cir] [*where contractors removed part of the roof of a building and placed a plastic sheet over the area, an insured was not entitled to recover for rainwater damage under a policy which required entry of the rainwater through damage to roof or walls since the plastic sheet was not a roof within the meaning of the policy*]; Charter Oak Fire Ins. v Carteret County Bd. of Commrs., 91 F3d 129 [Table], 1996 WL 389480 [Text] [4th Cir] ["*[U]nder the policy, before Charter Oak is liable for interior water damage, there must be damage to the building's roof from a covered loss...[W]e agree with the district court that the plywood sheeting and felt paper covering the DSS building at the time of loss was not a roof as intended by the parties under the insurance contract. Therefore, water damage sustained to the interior of the building was excluded under the Charter Oak policy*"]; Diep v California Fair Plan Assn., 15 Cal App 4th 1205 [Cal App 2 Dist] [*Insurance policy providing that insurer would be liable for loss to interior of building caused by rain entering building through an opening in a roof caused by the direct action of wind did not cover damage to insured 's property when wind*

blew open plastic sheeting, used when a part of the roof was removed for repair, permitting rain to enter the building]).

In opposition plaintiff argues that, as a matter of public policy, the term "roof" should pertain to temporary coverings of a residential dwelling and cites instances in the law where owners of residential premises are afforded greater protection than other property owners for the same hazard. While plaintiff's argument is emotionally appealing, the logical reasoning of the cited cases is more persuasive. The term "roof" as used in the insurance policy was clearly intended to mean a permanent part of the structure it covers. The force of wind or hail required to shift, move, or create an opening in a tarpaulin is vastly different from that which would cause an opening in a typical roof or wall. This is not a risk the defendant sought to insure against.

As a last resort, an insured may seek to hold an insurer liable for a defense and indemnification even if a policy does not provide coverage for a loss where the insurer is subject to an equitable estoppel (See, Albert J. Schiff Associates, Inc. v Flack, supra; McKay v Healthcare Underwriters Mut. Ins. Co., 295 AD2d 686). However, in the case at bar, the plaintiffs cannot successfully invoke the doctrine of equitable estoppel because they did not adequately establish its elements (See, Hanover Ins. Co. v Inter-Reco, Inc., 15 AD3d 443) and because the insurer at all times denied an obligation to defend and indemnify (See, Charlestowne Floors, Inc. v Fidelity and Guar. Ins. Underwriters, Inc., 16 AD3d 1026).

This should not deprive plaintiffs from seeking recourse against the roofing contractors who, presumably, have insurance that covers any negligence or mishaps on their behalf.

Summary judgment is warranted when there is no issue of fact which

must be tried (See, Alvarez v Prospect Hospital, 68 NY2d 320). In the case at bar, the defendant insurer, not the plaintiff insureds, is entitled to summary judgment.

Accordingly, the motion by defendant Tower for summary judgment dismissing the complaint against it is granted. The cross motion by the plaintiffs for, inter alia, summary judgment on the issue of liability is denied.

Short form order signed herewith.

Peter J. Kelly, J.S.C.