

Farrell v American Intl. Ins. Co.

2010 NY Slip Op 31501(U)

May 31, 2010

Supreme Court, Nassau County

Docket Number: 020531/07

Judge: F. Dana Winslow

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SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

JAMES FARRELL,

**TRIAL/IAS, PART 5
NASSAU COUNTY**

Plaintiff,

-against-

**MOTION SEQ. NO.:002
MOTION DATE:2/26/10**

**AMERICAN INTERNATIONAL INSURANCE
COMPANY,**

INDEX NO.:020531/07

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Motion by defendant for summary judgment dismissing the complaint, or in the alternative for summary judgment limiting plaintiff's damages to those damages that are covered by the terms and conditions of defendant's policy issued to plaintiff that directly resulted from the water damage loss, is **denied**.

Background

Plaintiff is the owner of property insured by defendant American International Insurance Company ("AIIC"). A copy of the Homeowner's Policy is annexed as Exhibit 5 to AIIC's Exhibits. The property consists of 8.9 acres of land, with a primary residence, a five-car garage, and a one-story guest cottage.

This action arises out of an incident involving water damage to the guest cottage. On February 12, 2007, when plaintiff's brother-in-law, Mr. Seib, arrived at the cottage he observed water spraying out of a hot water pipe that was intended for a washing machine located in the small laundry area. He observed that the

basement was flooded and that the water was rising up the length of the staircase to the basement. According to Mr. Seib, he called his sister-in-law, who rented a pump, and he then proceeded to pump water out of the basement.

Mr. Seib stores machinery and equipment for his business at the cottage, and was frequently at the premises. He testified that he noticed nothing unusual about the temperature in the cottage on February 12, 2007. The thermostat was always set at 55 degrees. He noticed no leaks in the kitchen or the bathroom. He claims he saw nothing to suggest that the pipe had burst because it was frozen.

Whether or not the cottage sustained water damage because a frozen pipe burst is one of the main issues presented by this case. The policy provision at issue provides:

G. Reasonable Care

You must use reasonable care to maintain heat in your residence or shut off and drain the water system or appliances if the home is vacant, unoccupied, or being constructed. We do not cover any loss caused by water freezing in a plumbing, heating, or air conditioning system or household appliance if reasonable care had not been exercised.

Insurance Policy, Part IV- Conditions.

Defendant insists that the water damage was the result of a frozen pipe that burst. Domenico Leotta, a plumber called by the plaintiff, arrived on February 13, 2007. He saw cold water spraying out of the washing machine hot water supply pipe. There was only a little water on the floor in the laundry room, because there were holes in the floor where the pipes came up from the basement, so most of the water leaked down into the basement. Mr. Leotta testified that the basement was

filled with water up to the top step. He cut approximately sixteen inches off the top of the spraying hot water pipe, and installed a new shut-off valve.

Mr. Leotta testified that there were broken windows in the kitchen, the temperature of the cottage was in the 30's, and he could tell that the pipe had burst because he could see that it had expanded and opened up "like a clam" (Leotta transcript annexed as Exhibit 13, pp. 19-20 and 41-42). He returned to the premises in the afternoon, found 10 inches of water in the basement, and he shut off the water supply to the building, located in the basement of the cottage (Leotta transcript, p. 37-38).

Plaintiff reported the water damage to his broker, who advised Harry Peters, the public adjuster retained by plaintiff. The broker reported the loss to AIIC on February 14, 2007, who sent Susan Link, a claims adjuster, out to inspect the premises on February 15, 2007. Ms. Link observed the "it was very, very cold . . . cottage was in a very poor state of repair . . . cabinets with no doors, no counter tops, no appliances, paint peeling, no finished floor on the main level (Link transcript annexed as Exhibit 17, at p.39-40). She took many photographs (Exhibits 12 and 20).

Ms. Link sent plaintiff a reservation of rights letter on February 20, 2007 (Exhibit 21), and hired Jerome Levine, a mechanical engineer, to provide an opinion as to the cause of the water damage. Ms. Link sent Mr. Levine copies of plaintiff's heating bills with Keyspan Energy for the cottage.

Mr. Levine performed his inspection on March 2, 2007 and prepared a report dated March 3, 2007 (Exhibit B to Levine affidavit). He noted the "deplorable condition" of the cottage, and mentioned the windows missing panes of glass on the first floor, some of which were adjacent to the hot water pipe at issue. He also noted that boiler and burners were covered with a measurable amount of rust, indicating exposure to high humidity conditions and low

temperatures for far longer than the time between February 12, 2010, and the date of his inspection.

Mr. Levine examined certified weather records (Exhibit D to Levine affidavit), from the National Oceanic and Atmospheric Administration for the period January 1 through February 28, 2007. These records show that from February 1, 2007, through February 11, 2007, the maximum temperature never rose higher than the 30s, and the minimum temperature was in the teens for seven of those days. Levine further analyzed the plaintiff's Keyspan Energy bills, and concluded that the record of energy consumption "indicates that there was literally no heat in the cottage for most of that time," referring to the previous billing period of 183 days which ended January 18, 2007.

Plaintiff made no repairs to the cottage and did not retain a restoration company to dry out the premises or to prevent mold growth. Instead plaintiff hired Anderson Contracting Company of Long Island, Inc. ("Anderson") to provide them with an estimate dated more than 28 months after the incident, for "Water Damage, Mold Remediation, Building Repair Estimate" (Exhibit 27). According to Anderson, the total repairs to the cottage are estimated at \$468,412.84. Anderson admits that this includes some upgrades. The Court notes that the estimate includes, *inter alia*, new cedar shingle siding and gutters, new chandeliers, new windows, new kitchen cabinetry, a refrigerator, dish washer, freestanding range, new gas lines for the entire house, and over \$100,000 for water extraction and remediation. It is unclear when the inspection took place on which the estimate is based.

In order to address the Anderson estimate, AIIC hired Mr. Jaeger, a property damage consultant. Mr. Jaeger inspected the cottage on August 27, 2009, and reviewed the photographs taken by Ms. Link on February 15, 2007, and the Anderson estimate. Mr. Jaeger found that the basement "was in a state of

complete disrepair, . . . the ceiling insulation was moist, and the wood paneling on the walls had visible mold stains” (Jaeger affidavit at par.9). Mr. Jaeger continues, “In contrast to the basement, there was no visible sign of water damage, such as mold growth or staining, to the first floor of the Premises except in the immediate area where the washing machine pipe broke” (Jaeger affidavit at par. 11). He concludes that “the majority of the damage to the Premises resulted from its extended lack of occupancy, its exposure to the elements (through several broken windows), lack of ventilation, lack of maintenance, and extreme neglect”(Jaeger affidavit at par. 12).

Mr. Jaeger opines that plaintiff’s complete failure to mitigate the effects of the water damage caused the extent of the damage in the basement to be significantly worse than if he had taken the appropriate remedial measure, and plaintiff’s failure to maintain the exterior is facilitating the deterioration of the premises. He further opines that none of the damage relating to any of the first floor of the premises, except the laundry area and parts of the kitchen, is attributable to the February 2007 water damage (Jaeger affidavit at par. 14-15).

Plaintiff also sent AIIC a report of a microbial investigation dated June 9, 2009 (Exhibit 28) by Jet Environmental Testing, Inc. (“Jet”). The report notes that the entire house was considered “the impacted area,” and that there was “visible mold growth in both the basement and on the main level.” According to Jet, cleaning would not suffice because the “mold will grow back since it is imbedded in the material,” and therefore removal of all sheetrock, paneling, and insulation from the entire home was recommended. This report is based on an inspection that took place on May 26, 2009, more than twenty-seven months after the water damage was discovered.

In response to the Jet report, AIIC hired Robert Leighton of Leighton Associates, Inc, an environmental consulting company to inspect the premises and

make findings concerning the cause and origin of the mold in the cottage. Mr. Leighton inspected the premises on August 27, 2009, and found “extensive water-related physical damage as well as widespread mold-like staining and excess moisture”(Leighton affidavit, par. 7). Mr. Leighton opines that mold growth on the first floor of the premises occurred primarily from humidity buildup in the premises as a result of very wet conditions in the basement, and the total lack of ventilation or dehumidification in both the basement and the first floor of the premises. He states that “It is highly unlikely that mold growth, and the need for mold remediation and rebuilding on the first floor of the home, was caused by the pipe rupture,” and that “mold growth in the basement may have been present prior to the reported pipe.” Mr. Leighton concluded that the “lack of any significant water mitigation and drying would also exacerbate the problem.”

Summary Judgment and Insurance Law

Summary judgment is the procedural equivalent of a trial [*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974)]. The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist [*Matter of Suffolk County Dept. of Social Services on behalf of Michael V. v James M.*, 83 NY2d 178, 182 (1994)]. The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law [*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986)]. Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so [*Zuckerman v City of New York*, 49 NY2d 557, 562 (1980)]. Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations [*Zuckerman*].

The court must determine the rights and obligations of parties to an

insurance contract based upon the policy's specific language [*State of New York v Home Indemnity Co.*, 66 NY2d 669, 671 (1985)]. Where an insurer seeks to deny coverage based upon a policy exclusion, the insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case [*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 (2003)]. While it is true that policies of insurance are to be construed liberally in favor of the insured and strictly against the insurer, where the policy provision at issue is clear and unambiguous, the provision must be given its plain and ordinary meaning, and courts should refrain from rewriting the agreement [*Government Employment Insurance Co. v Kligler*, 42 NY2d 863 (1977)].

Reasonable Care to Maintain the Heat

In this case the plain meaning of the policy provision quoted above required the insured to use "reasonable care" to maintain heat in the premises, in order for coverage to be available in the case of water freezing in a plumbing system. Defendant AIIC has presented a *prima facie* case that the cottage was vacant or unoccupied for many months before the incident, very little heat was used in the cottage in early 2007, and the temperatures were cold enough to cause freezing. There is also testimony that a frozen pipe that bursts has the appearance, as the pipe allegedly did here, of a "clam" (Plumber Leotta) or a "fishmouth" (Engineer Levine)."

The burden then shifts to plaintiff to raise a triable issue of fact. Plaintiff's engineer denies that the pipe burst because it froze, because the pipe at issue did not abut an exterior wall and he derides the Mpemba effect as "an old wives tale" (Rosner affidavit, par. 16). Plaintiff's engineer further argues that, based on the utility bills, the heating system continued to function and produce a reasonable amount of heat up until the time it stopped running as a result of water infiltration

(Rosner affidavit, par. 18).

Plaintiff's plumber opines that is "highly unlikely that a freeze up would occur to a pipe adjacent to an interior wall when no other pipe, especially those that are adjacent to exterior walls, froze also" (Zinnia affidavit, par 11). The plumber continues, that "it is much more likely that there was an original leak that occurred unrelated to the temperature" and that when a large quantity of water accumulated in the basement, it caused the heating unit to shut down (Zinnia affidavit, par. 14).

Mr. Seib insists that he was in and out of the cottage frequently (Seib affidavit par. 5), and never noticed a temperature drop or broken windows (Seib affidavit, par. 15-16). According to Mr. Seib, the temperature in the cottage was maintained at 55 degrees (Seib affidavit, par.10). Mr. Seib also testified that when he first discovered the water leaking from the pipe, he got his pliers and used them to pinch the copper tubing to reduce the water flow to a trickle (Seib transcript, p. 40). In reviewing heating bills plaintiff testifies that he never saw any indication that gas was not being consumed or that the heat was not being maintained (Farrell affidavit, par. 6).

On this record, plaintiff has raised a triable issue of fact as to whether he used "reasonable care" to maintain heat in the cottage [*McCabe v Allstate Ins. Co.*, 260 AD2d 850 (3rd Dept. 1999)]. This is a matter for the jury.

The Duty to Mitigate Damages

Defendant further argues that plaintiff cannot recover because he did nothing to dry out the basement of the cottage and mitigate his damages.

Defendant relies on the following policy provision:

A. Your Duties After a Loss

In the event of an occurrence which is likely to involve this policy, or

if you or any other insured person under this policy is sued in connection with an occurrence which may be covered under this policy, you or an insured person must:

* * *

4. Protect the property from further damage. If repairs to the property are required, you must:

- a. Make reasonable and necessary repairs to protect the property; and
- b. Keep an accurate record of all repair expense.

Insurance Policy, Part IV - Conditions.

Plaintiff objects to any duty to mitigate damages, and avers:

At no point in time did any representative of the Defendant even remotely suggest that there were actions that I, as the insured, should be taking to protect or preserve the premises. They had two different people come and examine the place and the only thing that I was told by either one of them was that, as a result of presence of mold, I should not go into that building.

(Farrell affidavit at par. 11). The evidence does show that Mr. Leotta did shut off the water supply, and Mr. Seib did pump out water from the basement, although a puddle remained (Seib transcript, p. 45) and the Court does note plaintiff's comment that when he visited the cottage the day after the incident, "the floor was muddy" (James Farrell transcript, p. 88).

The law generally imposes upon a party subjected to injury from breach of contract the duty of making reasonable exertions to minimize the injury [see *Holy Properties Ltd, LP. v Kenneth Cole Productions.*, 87 NY2d 130, 133 (1995); *Hamilton v McPherson*, 28 NY 72 (1863)]. No recovery may be had for losses which the injured party might have prevented by reasonable efforts [*Wilmot v*

State, 32 NY2d 164 (1973)]. The injured party “had no right, by obstinately persisting in treating the contract as alive, to make damages larger than they otherwise would have been” [*Losei Realty Corp. v City of New York*, 254 NY 41, 48 (1930)]. The question of whether the injured party acted reasonably to mitigate its damages is a question of fact [*Losei Realty Corp; Tynan Incinerator Co., Inc. v International Fidelity Ins. Co.*, 117 AD2d 796, 797 (2nd Dept. 1986)].

On this record, where both the insurance policy and the law require reasonable conduct to mitigate damages, a jury question is plainly presented as to whether plaintiff acted reasonably to mitigate his damages.

No Coverage for Loss Caused by Mold

The policy contains a further provision relied upon by defendant:

22. Fungi, Wet or Dry Rot or Bacteria

We do not cover any loss caused by the presence, growth, proliferation, spread or any activity of fungi, wet or dry rot, or bacteria.

Insurance Policy, Part II, Property - (D) Exclusions. The policy defines fungi to include “all forms of mold or mildew” (Part I - Definitions, on p. 1). Where an insurance policy excludes coverage caused by mold, and mold is found to be the “efficient proximate cause” of the insured’s loss, denial of insurance coverage will be upheld [*Siegel v Chubb Corp.*, 33 AD3d 565 (1st Dept. 2006); *Hritz v Saco*, 18 AD3d 377 (1st Dept. 2005)].

Here, the cottage sustained water damage. If that damage is covered by the subject insurance policy, triable issues of fact are presented as to whether, or to what extent, mold is the “efficient proximate cause” of plaintiff’s loss.

Damages for an Amount Greater Than That Shown on Declarations Page

A final policy provision at issue herein is the provision guaranteeing payment by AIIC of the rebuilding cost for a covered loss, "even if this amount is greater than the amount of coverage show on the Declarations Page" (Insurance Policy, Part II - Property (B) Payment of Loss (1)(a). AIIC argues that plaintiff is relying upon this provision to obtain a brand new upgraded guest cottage, when the condition of the cottage at the time of the water damage was "deplorable."

This Court has already noted that the Anderson estimate contains items that were not present in the cottage on February 12, 2007, such as kitchen cabinets and appliances. In addition, the Anderson estimate calls for a total renovation of the exterior of the cottage, yet there is no testimony regarding the exterior of the premises. The Court further notes that AIIC does admit plaintiff may be entitled to recover "perhaps some of the damaged items in the laundry/kitchen area."

Overall, it is premature for this Court to determine whether coverage under this provision is available to plaintiff, as plaintiff must first meet the standards set forth above for any coverage whatsoever. Secondly, it is AIIC's burden to prove exactly what items fall outside the coverage of this provision, either because the item was not present in the cottage on February 12, 2007, not damaged as a result of the water damage incident, or already damaged before February 12, 2007. AIIC has not met this burden on this record.

Based on the foregoing, defendant's motion for summary judgment, or alternative relief, is **denied**.

This Constitutes the Order of the Court.

Dated:

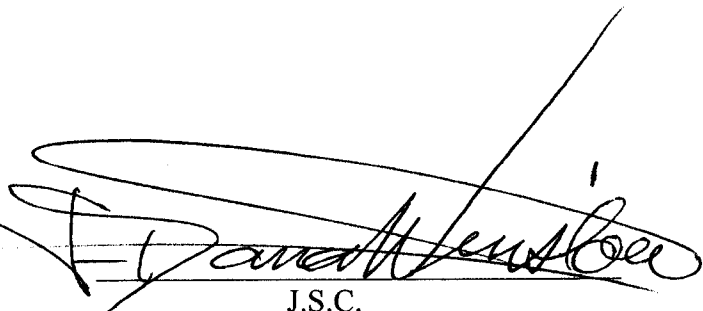
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JUN 14 2010

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J.S.C.