

Colombo v Merchants Ins. Group

2010 NY Slip Op 33773(U)

August 9, 2010

Sup Ct, Suffolk County

Docket Number: 08-36932

Judge: Denise F. Molia

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 4-28-10 (#002)
MOTION DATE 6-25-10 (#003)
ADJ. DATE 7-9-10
Mot. Seq. # 002 - MG
003 - XMD; CASEDISP

-----X		
FRANK L. COLOMBO and GRACE E.	:	WHITE, CIRRITO & NALLY, LLP
COLOMBO,	:	Attorney for Plaintiffs
	:	58 Hilton Avenue
Plaintiffs,	:	Hempstead, New York 11550
- against -	:	
	:	
MERCHANTS INSURANCE GROUP and	:	FELDMAN, RUDY, KIRBY & FARQUHARSON
MERCHANTS PREFERRED INSURANCE	:	Attorney for Defendants
COMPANY as an affiliate of MERCHANTS	:	410 Jericho Turnpike, Suite 315
MUTUAL INSURANCE COMPANY,	:	Jericho, New York 11753
	:	
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 43 read on this motion and cross motion for declaratory judgment and summary judgment by Notice of Motion/Order to Show Cause and supporting papers (002) 1 - 11 ; Notice of Cross Motion and supporting papers (003) 12-23 ; Answering Affidavits and supporting papers 24-27; Replying Affidavits and supporting papers 28-32; Other 33-36; 37-41; 42-43 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is

ORDERED that this motion (002) by the plaintiffs, Frank L. Colombo and Grace E. Colombo, for an order declaring that the defendants are required to cover certain losses suffered by the plaintiffs, and for summary judgment on the cause of action for breach of contract is granted; it is hereby declared that the defendants must provide the coverage for the insured premises pursuant to the policy for the losses arising out of the collapse of the foundation and consequential damage to the attendant structures; and it is further

ORDERED that this cross-motion (003) by the defendants, Merchants Insurance Group and Merchants Preferred Insurance Company as an affiliate of Merchants Mutual Insurance Company, pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiffs' complaint has been rendered academic based upon the decision rendered in motion (002) and is denied as moot.

The complaint of this action sets forth that the plaintiffs and Merchants Insurance Group and Merchants Preferred Insurance Company as an affiliate of Merchants Mutual Insurance Company (Merchants) on May 2, 2008, entered into a written contractual agreement entitled "Homeowners Insurance Policy" number HOP1014884 covering the premises located at 41 North Pine Lake Drive, Patchogue, New York, for a period of one year. It is claimed that on July 14, 2008, the plaintiffs suffered a covered casualty loss to the subject premises when a portion of the premises collapsed causing the plaintiffs to suffer damages and that Merchants has declined coverage and has failed and refused to make adequate payment to the plaintiffs. The plaintiffs seek judgment declaring that the loss

and damages occasioned by this occurrence are a covered loss for which the plaintiffs are entitled to compensation from the defendants by virtue of the policy of insurance. The plaintiffs have also set forth a cause of action for breach of contract.

In motion (002) the plaintiffs seek judgment declaring the Merchants/defendants are required to cover certain losses suffered by the plaintiffs, and for summary judgment on the cause of action for breach of contract. In cross-motion (003) Merchants seeks summary judgment dismissing the complaint on the basis that the collapse was excluded from policy coverage and that the claimed loss did not occur as the direct result of the collapse of a building or any part of a building as a result of a specifically named peril.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeraxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (002), the plaintiffs have submitted, inter alia, an attorney's affirmation; copies of the pleadings, answer; a copy of the subject policy; copies of the transcripts of the examinations before trial of Frank L. Colombo dated December 10, 2009 and Brian Johnson dated December 10, 2009; copy of a letter dated September 11, 2008; and the affidavit of Joseph Cannizzo, P.E..

In support of motion (003), the Merchants defendants have submitted, inter alia, an attorney's affirmation; the affidavits of Herman Silverberg, P.E. and accompanying curriculum vitae which is not sworn to, and the affidavit of Brian Johnson; copies of the pleadings and answer in this action and the action commenced under Index No. 08-36931 by Frank L. Colombo and Grace E. Colombo against Paul Pastore and Sparkle Pool Service, Inc.; a copy of the subject Homeowners Insurance Policy; and a partial copy of the transcript of Frank Colombo dated December 10, 2009.

Frank L. Colombo testified to the effect that he and his wife have been the owners of the property located at 41 North Pine Lake Drive, Patchogue, New York since May 2008. In May 2008, at the time of the purchase, he obtained an insurance policy covering the premises from Merchants. On July 14, 2008, he suffered a loss at the premises when a portion of the foundation collapsed. At the time of the incident, sidewalks were being installed in the front of the house and Sparkle Pool Service was installing a pool on the property. He hired Paul Pastore, recommended by Sparkle Pool, to excavate the site for the pool where there had been a prior pool located with a deck surrounding it. On July 11, 2008, Pastore excavated the site for the pool. It was explained to Pastore that the yard was on a lake and due to DEC regulations, the pool had to be installed five feet from the back of the house. He was not home when the excavation was performed, and when he came home he was overwhelmed at the amount

of topsoil removed by Pastore, whom he claims went a little too close to the foundation as it was only about five feet away, but Pastore told him not to worry. He checked the foundation of the house and observed no cracks or damage. There was no work being conducted on the exterior of the house the next day. On the morning of July 14, 2008, Sparkle Pool began the pool installation and by about 3:30 p.m., the sides of the pool were erected, the structure supports were in place, and they had all the sand inside the pool area, almost ready for the liner installation. Later, as he was sitting in his living room at the back of his house, he heard what sounded like an explosion, felt the house shaking, and saw a cloud of dust. When he ran outside, he realized the foundation had blown out and his Florida room (enclosed porch) had pulled away from the back of the house. Windows were broken and cracked. The roof of the porch was sagging, and the slate floor was separating from the slab. He noticed a day or two later that the three doors on that porch did not open and close properly. Sheetrock cracked in the garage and the door going from the porch to the garage would not function. He could not operate the door going from the porch into the dining room or the door leading to the outside driveway of the house. On July 14, 2008, Merchants sent James Mason to the site, and on July 15th or 16th, Mason returned with a "forensics engineer." He testified that he was told that the excavator removed too much soil and dirt and exposed the footing of the foundation. He made a claim to Merchants for the physical damage to his home. He hired multiple contractors to make repairs to his home in the amount of about \$70,000, but stated the work, including a new foundation, was not even half finished.

EXPERTS

Joseph Cannizzo set forth in his affidavit, submitted in support of the plaintiff's application, that he is an engineer duly licensed in the State of New York. It is his opinion that the mode of wall failure was primarily by sliding of the footing which occurred when the excavation contractor violated the limits of the influence line for the footing. For the two days between the excavation and the collapse, the foundation wall was in a precarious state of equilibrium. The pool installation contractor should have noticed the apparent over excavation that had been performed by the excavator, and should not have disturbed a shovelful of earth until he was sure the foundation wall was stable. The collapse of the foundation wall was due to the excavation contractor excavating within the influence line of the footing and the pool construction contractor removing soil upon which the foundation wall was relying on for support. The collapse occurred as the pool contractor was in the process of constructing the pool. Mr. Cannizzo further states that the failure of both the excavator and pool contractor to apply proper and acceptable construction industry methods was a cause of the foundation wall sliding and collapsing, and the subsequent damage to the floor, walls, roof and supports of the sunroom.

Herman Silverberg, sets forth in his affidavit, submitted on behalf of the defendants, that he is an engineer licensed in the State of New York and was retained by Merchants to make observations and provide an opinion regarding the cause of damages to the plaintiff's property. He observed the rear foundation wall of the property was damaged during the installation of a swimming pool 42 inches from the foundation wall which was an eight inch concrete block wall supported on an eight inch high and eight inch wide concrete base. The walls on the porch were bowed outwards and the roof was sagging but remained standing. He states that the excavator had removed approximately four feet of soil on the outside of the foundation wall which was needed for lateral wall support to resist the retained soil under the house. The concrete foundation base or footing was cracked indicating the footing was undermined during the excavation process and the loss of the subsoil under the supporting concrete base caused the concrete base to crack. A section of retained earth behind the wall slid against the concrete block foundation wall which caused the wall to be pushed out and damaged. It is his opinion that the structural damage was caused by the over excavation for the pool which removed the lateral exterior support of the foundation wall. Photographs were also submitted by Mr. Silverberg indicating damage to a part of the foundation wall.

DISCLAIMER

Brian Johnson testified to the effect that he is employed by Merchants as an adjuster for property claims for seven years adjusting property claims. Merchants insured the premises at issue on the date of loss and the premium

had been paid. The HO3 policy covered the dwelling, the personal property and any other structures on the premises for the cost of replacement per the policy limits: \$422,000 for the dwelling, personal property \$295,400, and loss of use \$84,400. The main dwelling was covered as well as other structures including the fences, decks, pools and sheds. The claim was reported July 14, 2008 and assigned claim number HO019997. An outside claims adjuster, James Mason, was sent to inspect the loss. Mr. Johnson had a conversation with Mr. Colombo on July 15, 2008 and on July 17, 2008, he spoke with Mr. Mason whom he stated did not give a cause for the collapse. Thereafter, he required an expert in structural engineering, Merman Silverberg, to provide the cause of the collapse of the foundation. On August 19, 2008, Mr. Colombo was advised that there is no insurance coverage for the loss.

Johnson testified that the foundation wall of the house and the foundation wall of the porch collapsed. The floor of the porch, the joist of the porch roof had collapsed and that porch was part of the building Merchants insured. He stated the report from LGI Forensic Group, prepared by Merman Silberberg, P.E., set forth in pertinent part that "... In conclusion, it is our opinion within a reasonable degree of engineering certainty, that the cause of the rear foundation wall collapse is due to the over excavation for the in-ground pool which removed the rear wall exterior soil support." Johnson stated the report did not mention that any part of the porch collapsed. The photographs provided by Mr. Silverberg did not show any of the porch or the condition of the structure itself, only the foundation. He did not have a conversation with Silverberg about whether there was damage to the structure on top of the foundation and could not recall if he spoke to Mr. Mason to ascertain the same.

In a letter dated September 11, 2008 prepared by Brian Johnson, Russ Baumann, Corporate Property Claims Manager, declined coverage on the basis that the loss was a direct result of the faulty excavation of exterior soil supporting the foundation wall which was needed for lateral wall support to resist the retained soil under the house. He set forth that "As per our investigation and the inspections conducted by James Mason Adjusting Services and LGI Forensic Group, engineering firm, we have concluded that the loss was a direct result of the faulty excavation of exterior soil supporting the foundation wall." He further states that "As per Mr. Hermann Silverberg of LGI Forensic Group "This excavation removed approximately 4 feet of soil on the outside of the foundation wall. The outside soil was needed for lateral wall support to resist the retained soil under the house. In addition to the loss of lateral support, it was observed that the concrete foundation base or footing was cracked indicating that the footing was undermined during the excavation process. This loss of subsoil under the supporting concrete base created a void that resulted in the concrete base cracking. A section of retained earth behind the wall slid against the concrete block wall. This resulted in the soil pushing against the wall which could not resist this lateral pressure which then caused the wall to be pushed out and **collapse.**" (emphasis added). "Unfortunately, based upon the exclusionary language listed above we must respectfully deny payment of your claim.

Russ Baumann also set forth in that letter written by Johnson that the policy of insurance provides under "Special provisions-Additional Coverages" at Collapse at item 8. b. We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:

a. Perils Insured Against in Coverage C-Personal Property. These perils apply to covered buildings and personal property for loss insured by this additional coverage.

b. Hidden decay;

c. Hidden insect or vermin damage;

d. Weight of contents, equipment, animals or people;

e. Weight of rain which collects on a roof; or

f. Use of defective material or methods in construction, remodeling or renovation

If the collapse occurs during the course of the construction remodeling or renovation.

Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items b.,c.,d.,e., and f. unless the loss is a direct result of the collapse of a building."

Based upon the foregoing, and in reviewing the policy, it is clear that the policy covers situations in which there has been a collapse due to methods in construction, remodeling or renovation occurring during the course of the construction, remodeling or renovation. Here, the facts of the case clearly support that the collapse occurred during course of construction, remodeling or renovation of the pool due to a method in construction, in which the subject damage would be covered under the policy.

It is noted that the affidavit of Merman Silverberg submitted by the defendants is different from the Silverberg report referred to in Mr. Baumann's disclaimer letter of September 11, 2008. In his affidavit, Silverberg avers that a "section of retained earth behind the wall slid against the concrete block foundation wall which caused the wall to be pushed out and damaged." By way of testimony by Johnson and by way of the disclaimer letter from Mr. Baumann, it was set forth that the foundation wall "collapsed" as quoted from Mr. Silverberg's report. Mr. Silverberg then submitted a further affidavit in the Reply wherein he states he prepared a report which included that the wall was "pushed out and collapse (sic)." He then states that when he used the term "collapse" in his report, it was used in a generic sense and not in a technical or engineering sense. He then states that the building and enclosed porch did not "collapse" as that term is defined under the policy issued by Merchants.

"In general, it is the courts which bear the responsibility of determining the rights or obligations of the parties under an insurance contract based upon the specific language of the particular policy" (*Scottsdale Insurance Company v Sagona Landscaping LTD.*, 2009 NY Slip Op 32107U, 2009 NY Misc Lexis 5245 [Supreme Court of New York, Richmond County [2009]). "As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning... and the interpretation of such provisions is a question of law for the court.... If the language of the insurance contract is ambiguous, however, the parties may submit extrinsic evidence as an aid in construction, and any ambiguity must be construed against the insurer as drafter of the policy" (*Essex Insurance Company v Laruccia Construction, Inc. et al*, 71 AD3d 818, 898 NYS2d 558 [2nd Dept 2010]). "Courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies.... An exclusion from insurance coverage must be specific and clear in order to be enforced" (*Jahier et al v Liberty Mutual Group*, 64 AD3d 683, 883 NYS2d 283 [2nd Dept 2009]). "Unambiguous policy provisions must be given their plain and ordinary meaning. While any ambiguity must be construed against the insurer as the drafter of the policy, the plain meaning of the policy's language may not be disregarded in order to find an ambiguity where none exists" (*Empire Fire and Marine Insurance Company v Eveready Insurance Company*, 48 AD3d 406, 851 NYS2d 647 [2nd Dept 2008]). "The test for ambiguity is whether the language of the insurance contract is susceptible of two reasonable interpretations.... Courts may as a matter of interpretation carry out the intention of a contract by transposing, rejecting or supplying words to make the meaning of the contract more clear. In construing the meaning of an agreement, courts must accord words their fair and reasonable meaning rather than their mere literal meaning" (*Essex Insurance Company v Pingley et al*, 41 AD3d 774, 839 NYS2d 208 [2nd Dept 2007]).

"The court must determine the intent of the parties from the plain meaning of the language employed, giving terms their plain, ordinary, popular and nontechnical meanings" (*Kula et al v State Farm Fire and Casualty Company*, 212 AD2d 16, 628 NYS2d 988 [4th Dept 1995]). Here, Mr. Silverberg states he used the word "collapse" in a generic meaning and not the technical meaning or within the policy meaning. Accordingly, this court will apply the plain, ordinary, popular and nontechnical meaning to the word "collapse" as used by Mr. Silverberg. Collapse is defined in the policy under: Special Provisions, page 1, item 8. as (1) "Collapse means an abrupt falling down or caving of a building or any part of a building with the result that the building or part of the building cannot be occupied for its current intended purpose." In the instant action there was a collapse or falling down of the foundation which is part of the house and attendant structures. It is determined that not only did the foundation collapse as it fell down, but also it no longer properly supported the Florida room, which caused, as described by the experts, the sun room to become bowed and sagging. Testimony by the plaintiff supports that the room could

not be occupied for its intended purpose due to safety issues and instability, which is consistent with the policy. Therefore, it is determined that this collapse of the foundation caused it attendant structure, the porch to suffer damage which is deemed covered under the subject policy.

It is noted that additional coverage is provided for “Collapse” under section f. for the use of defective material or methods in construction, remodeling or renovation-if the collapse occurs during the course of construction, remodeling or renovation. Coverage is not excluded for faulty, inadequate or defective design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction. Although Baumann acknowledges in his disclaimer that a collapse is covered under the policy, he also sets forth exclusions to the coverage for collapse. He notes that “Under Section 1-Exclusions 1, “ We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

b. Earth movement, meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption, landslide, mine subsidence, mudflow, earth sinking, rising or shifting; unless direct loss by

- (1) Fire;
- (2) Explosion; or
- (3) Breakage of glass or safety glazing material which is part of a building, storm door or storm window; ensues and then we will pay only for the ensuing loss.”

Brian Johnson testified that he relied upon the exclusion for the collapse based upon “earth movement” in issuing the disclaimer, but then testified that earthquake including land shock waves or tremors before, during or after volcanic eruption, landslides, mudslides, and mine subsidence, did not occur. However, he stated, there was earth sinking due to earth being removed from under the foundation, then stated that the earth did not sink, the earth was removed. It is noted in *Park Square Associates, Inc. et al v Interstate Indemnity Company et al*, supra, the Court held that where the plaintiff’s loss involved the physical removal of earth from underneath the plaintiff’s building during excavation and underpinning operations on the adjoining lot, the plaintiff’s loss did not fall within the ‘earth movement’ exclusion. In applying the same and in reading the plain language of the policy, it is determined that the earth movement exclusion does not apply to the facts of the instant action. Instead the collapse of the foundation and subsequent shifting and bowing of the attendant structures were caused by the collapse of the foundation due to the excavation of the soil.

It is further determined that Merchants has not satisfied its burden of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation. 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” and “an insurer’s justification for denying coverage is strictly limited to the ground stated in the notice of disclaimer” (*Adames v Nationwide Mutual Fire Insurance Company*, 5 AD3d 513, 866 NYS2d 210 [2nd Dept 2008], see also, *Shell et al v Fireman’s Fund Insurance Company*, 17 AD3d 444m 793 NYS2d 110 [2nd Dept 2005]; *Pawley Interior Contractin, Inc. v Harleysville Insurance Companies*, 11 AD3d 595, 782 NYS2d 660 [2nd Dept 2004]; *General Accident Insurance Group v Cirucci et al*, 46 NY2d 862, 414 NYS2d 512 [1979]). In that the letter of disclaimer does not base the disclaimer on the fact that there was not a collapse, Merchants is now precluded from claiming that there was no collapse as it is attempting to do in arguing for summary judgment. The disclaimer clearly and unequivocally sets forth that the disclaimer for the collapse is based upon “earth movement” and faulty, inadequate or defective design, specifications, workmanship, repair, construction, renovation, remodeling, grading and compaction which are excluded under the policy.

“Where an insurer denied coverage based upon an exclusion, the burden is on the insurer to demonstrate that the exclusion applies in the particular case and that it is subject to no other reasonable interpretation” (*Jahier et al v Liberty Mutual Group, et al*, supra). “An insurer generally has the burden of proving that a loss is within the

scope of a policy exclusion” (*Park Square Associates, Inc. et al v Interstate Indemnity Company et al*, 2010 NY Slip Op 31045U, 2010 NY Misc Lexis 1975 [Supreme Court of New York, New York County [2010]). “The law governing the interpretation of exclusionary clauses in insurance policies is highly favorable to insureds. Whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction. Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation. Courts have enforced policy exclusions only where they have a definite and precise meaning, unattended by danger of misconception, and concerning which there is no reasonable basis for a difference of opinion” (*Pioneer Tower Owners Association v State Farm Fire & Casualty Company et al*, 12 NY3d 302, 880 NYS2d 885 [2009]).

The disclaimer letter sets forth that under Section 2 of the policy, “We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.

c. Faulty, inadequate or defective

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compacting; Of part or all of any property whether on or off the “residence premises.”

Brian Johnson testified that the policy provided that the building, which included the porch, was insured for “Use of defective material or methods in construction remodeling or renovation.” He stated the policy does not define “construction” and does not limit construction to the interior of the building. A basis for denial of coverage, he testified, was because loss to a foundation is not included unless the loss is a direct result of the collapse of the building and that the loss occurred because of the foundation collapse. However, he then stated that the policy does not state that there is no coverage for loss to a foundation. Under the exclusion, he states, Merchants would have to pay for the repair of the building but not necessarily the repair of the foundation. He further testified that any ensuing loss to property described in coverages A and B not excluded or excepted in this policy is covered, so he relied upon the exclusions in the section that said “faulty, inadequate or defective design specifications, workmanship, repair, construction, renovation, remodeling, grading and compaction of part of or all of any property whether on or off the resident’s premises.” He stated the collapse did not occur during the excavation but two days later and that is why he excluded coverage. However, he noted that the pool was being constructed at the time of the collapse, so he considered the cause of the collapse to be faulty workmanship in which coverage is excluded. He could not explain the difference between a defective method in construction for which coverage would be provided and faulty workmanship which in which coverage would be excluded. He felt the faulty workmanship was the removal of the soil but if an excavator removed all the dirt from around the foundation wall which caused the porch to collapse, that would not be a defective method in his construction. Although Brian Johnson based the exclusion of coverage on faulty workmanship, he stated that a defective method in construction for which coverage would be provided and faulty workmanship which in which coverage would be excluded were not capable of definition by him.

In that an exclusion must be made in clear, specific and unmistakable language in order to be enforced, and is not to be extended by interpretation or implication, but is to be accorded a strict and narrow construction, it is determined that the exclusion based upon faulty workmanship does not meet that criteria. The definitions of faulty workmanship and defective method in construction are not defined in the policy. This court determines that the excavation process, which is claimed to be the cause of the collapse of the foundation, is a defective method in construction, for which coverage is provided under the policy. Merchants has not excluded the foundation from coverage in its policy, as testified to by Johnson and as determined from review of the subject policy, and therefore,

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there is coverage for the foundation and for the attendant structures which were damaged as a result of that foundation collapse.

It is determined that plaintiffs have demonstrated prima facie that the policy exclusions did not clearly and unambiguously apply to the loss in this case, that there was a breach of the contract by Merchants in denying the insurance coverage provided by the applicable policy, and that the plaintiffs are entitled to judgment declaring their loss to be covered pursuant to the terms of the policy. It is further determined that based upon the foregoing, the defendants' application for summary judgment dismissing the complaint has been rendered academic and is denied as moot.

Accordingly, motion (003) is granted and motion (004) is denied in its entirety. It is declared that the Merchants defendants are obligated and directed to provide the requisite insurance coverage for the insured premises for the claimed losses pursuant to the coverage provisions set forth in the policy.

Hon. Denise F. Motu

Dated: August 9, 2010

J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION