

**Wilner v Allstate Ins. Co.**

2011 NY Slip Op 30817(U)

March 13, 2011

Supreme Court, Nassau County

Docket Number: 16164/07

Judge: F. Dana Winslow

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**HARRY WILNER and JUDITH WILNER,**

**TRIAL/IAS, PART 4  
NASSAU COUNTY**

**Plaintiffs,**

**MOTION DATE: 10/10/10  
MOTION SEQ. NO.: 003, 004**

**-against-**

**ALLSTATE INSURANCE COMPANY,**

**INDEX NO.: 16164/07**

**Defendant.**

**The following papers having been considered on the motion (numbered 1-4):**

**Order to Show Cause.....1**

**Notice of Cross Motion.....2**

**Reply Affirmation and Affirmation in Opposition  
to Plaintiff's Motion for Summary Judgment.....3**

**Reply Affirmation of Suzanne M. Saia.....4**

**Allstate's Memorandum of Law in Support Of Motion to  
Reargue.....A**

**Memorandum of Law in Support of Plaintiff's Cross-Motion  
And in Opposition to Allstate Insurance Company's  
Motion for Summary Judgment.....B**

**Reply Memorandum of Law in Further Support of  
Plaintiff's Cross-Motion for Partial Summary  
Judgment.....C**

Motion by defendant ALLSTATE INSURANCE COMPANY (Seq. 003), and cross-motion by plaintiffs HARRY WILNER and JUDITH WILNER (Seq. 004), for summary judgment pursuant to CPLR §3212, are determined as follows. In the interest of consistency and economy, the Court has adjourned the motions for one month so that it may decide concurrently all ten motions pending in four separate actions arising out the same events.

This is an action brought by homeowners HARRY WILNER and JUDITH WILNER ("Plaintiffs") against ALLSTATE INSURANCE COMPANY ("Defendant") for alleged breach of contract and violation of **General Business Law §349** in connection

with Defendant's disclaimer of insurance coverage under Plaintiff's Allstate Deluxe Plus Homeowner's Policy (the "Policy"). For a complete recitation of the facts and procedural history in this action, reference is made to the prior order of this Court, dated December 23, 2008 (the "December 2008 Order"), in which the Court dismissed Plaintiffs' second cause of action, sustained Plaintiffs' third cause of action, and granted Plaintiffs' cross-motion for discovery, as provided therein. The December 2008 Order also resolved (in accordance with a conference held on December 12, 2008) the matters upon which Defendant was seeking reargument in the current motion. Defendant filed an appeal of the December 2008 Order, and on January 12, 2010, the Second Department affirmed so much of the December 2008 Order as was the subject of the appeal.

The motion and cross-motion now before this Court seek summary judgment on the first cause of action for breach of contract, which turns on the question of whether or not Plaintiffs are entitled to insurance coverage for property damage arising out of a storm event that occurred in October of 2005. The essential facts are undisputed. Plaintiffs are the owners of property located at 6 Verity Lane, Roslyn, NY (the "Property"). The Property and contiguous properties are burdened by a storm sewer drainage easement in favor of the Village of Roslyn (the "Village"). On or about October 7, 2005 through October 8 or 9, 2005, a heavy rainstorm occurred, resulting in an overflow of water from a clogged sewer drain manhole located on contiguous property uphill of the Property. The concentrated flow of water from the clogged manhole caused the soil in the rear of Plaintiffs' property to slide downhill, and resulted in the destruction of Plaintiffs' retaining wall, uprooting of several trees, and damage both to the Plaintiffs' property and the property of the Village. *See* Affidavit of Joseph V. Palmieri, sworn to on October 30, 2008, ¶ 6, and Exhibits thereto [Attached to Order to Show Cause]; Report of PalMar Engineering, dated April 30, 2007 [Exhibit I to Cross-Motion].

Plaintiffs asserted a first-party claim under the Policy for the damage to their retaining wall [Claim Number 5381643898]. By letter dated October 27, 2005, Defendant disclaimed coverage on the basis that "[w]e do not cover loss or damage resulting directly or indirectly from Earth movement of any type, including, but not limited to earthquake, volcanic eruption, landslide, subsidence, mudflow, pressure, sinkhole, erosion or the sinking, rising, shifting, creeping, expanding, bulging, crackline, settling or contracting of the earth." On or about July 24, 2006, Plaintiffs' counsel issued a request to Defendant for reconsideration of the disclaimer based upon the argument that the Policy's earth movement exclusion did not apply to the loss. Communications between the parties followed, and on December 21, 2006, an engineering firm hired by Defendant was sent to Plaintiffs' home to determine the cause and extent of the damage to the retaining wall. The report of PalMar Engineering, P.C. dated April 30, 2007 (the "PalMar Report") opined that the damage to the retaining wall was caused by the flow of

water across the Property during the storm of October 7, 2005. “Although much of this water flow was due to the natural flow of runoff across the lawn, we do not believe it was the cause of the collapse. The area had experienced similar rainfalls without any damage to the wall. We therefore conclude that it was the additional water flowing out of the clogged storm drain on the adjacent lot at 4 Verity Lane that added sufficient lateral force to cause the collapse.” [Pal Mar Report, final ¶, Cross-Motion Exhibit I.]

The instant action was commenced on September 12, 2007. In their first cause of action, Plaintiffs asserted that the destruction of the retaining wall was a covered loss under the Policy, and that Defendant’s failure to pay insurance proceeds constituted a breach of contract.

On or about September 24, 2007, Defendant issued a second disclaimer letter purportedly based upon the PalMar Report. As grounds for this disclaimer, Defendant cited the following Policy exclusions:

- “1. Flood, including, but not limited to, surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.
2. Water or any liquid or sludge which contains water, whether or not combined with other chemicals or impurities, that backs up through sewers or drains.
4. Water or any liquid or sludge which contains water, whether or not combined with other chemicals or impurities, on or below the surface of the ground, regardless of its source. This includes water or any liquid or sludge which contains water, whether or not combined with other chemicals or impurities, which exerts pressure on, or flows, seeps or leaks through any part of the residence premises . . .
5. Earth movement of any type, including, but not limited to earthquake, volcanic eruption, lava flow, landslide, subsidence, mudflow, pressure, sinkhole, erosion, or the sinking, rising, shifting, creeping, expanding, bulging, cracking, settling or contracting of the earth. This exclusion applies whether or not the earth movement is combined with water . . .
12. Collapse, except as specifically provided in Section I – Additional Protection under Item 12, “Collapse.”
15. [Losses caused by:] g) settling; cracking; shrinking; bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings;
17. Freezing, thawing, pressure or weight of water, ice or snow, whether driven by wind or not. This exclusion applies only to fences, pavements, patios, swimming pools, foundations, retaining walls, bulkheads, piers, wharves or docks.

21. Weather conditions that contribute in any way with a cause of loss excluded in this section to produce a loss.
22. Planning, Construction or Maintenance, meaning faulty, inadequate or defective:
  - d) maintenance, of property whether on or off the residence premises by any person or organization.
23. [Loss] when: a) there are two or more causes of loss to the covered property; and b) the predominant cause(s) of the loss is (are) excluded under Losses We Do Not Cover, items 1 through 22.”

[Cross-Motion, Exhibit K; *See also* Policy, attached to Order to Show Cause at Exhibit K.]

The instant motion for summary judgment concerns the first cause of action for breach of contract. In their supporting papers, Plaintiffs assert that none of the foregoing exclusions applies. Plaintiffs contend that the damage to their retaining wall was caused by a broken or malfunctioning storm drain. According to the report of Cameron Engineering & Associates, LLP, dated December 8, 2005 (the “Cameron Report”), the brick sewer drain manhole on the adjoining property had deteriorated and partially failed, allowing soil to enter and clog the manhole. According to the PalMar Report, it was primarily the overflow of water from the clogged manhole, rather than the natural runoff from the rainstorm, that caused the retaining wall to collapse. Synthesizing the two reports, Plaintiffs argue that the broken storm drain was the ultimate cause of the loss – if it were not for the broken storm drain, the water would not have overflowed and the retaining wall would not have collapsed.

Defendant maintains, essentially, that the immediate and operative force causing the retaining wall to collapse was the flowing water, not the broken manhole. Losses caused by surface or ground water are excluded from coverage, regardless of the source of the water. [Exclusion 4] To the extent that the weight or pressure of water caused the retaining wall to collapse, an additional exclusion applies. [Exclusion 17] To the extent that the heavy rainfall was the source of the water, an additional exclusion applies. [Exclusion 21] To the extent that a clogged storm drain was the source of the water, an additional exclusion applies. [Exclusion 2] Moreover, Defendant argues, even to the extent that the clogged drain was caused by a broken, malfunctioning or deteriorating manhole, the loss is still excluded. [Exclusion 23] Pursuant to Exclusion 23, when there are two or more causes of loss to covered property, the loss is excluded if the predominant cause of the loss falls within any of the other Policy exclusions.

An insurer seeking to disclaim on the basis of a policy exclusion bears the burden of proof regarding the application of the exclusion. **Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York**, 241 AD2d 66, 70-71. The inquiry is guided by the “reasonable expectation and purpose of the ordinary business [person] when making an ordinary business contract.” **Album Realty**, 80 NY2d at 1010. In other words, would the contracting parties have reasonably contemplated a loss arising as it did to be characterized as falling within the exclusion?

In the case at bar, the only evidence of the objective intent of the contracting parties is the Policy itself. The comprehensive nature of the Policy exclusions for water and weather related events, including the number and breadth of individual exclusions, suggests that the parties did not contemplate coverage of such storm-related damage as occurred here. The Court does not, however, rely upon this interpretation.

The determination herein ultimately turns on a single question: what was the predominant cause of the loss? When more than one event or condition has contributed to a loss, the formulation adopted by New York Courts in determining the existence of coverage is to look to the “proximate, efficient and dominant” cause of the loss. *See Album Realty Corp. v. American Home Assur. Co.*, 80 NY2d 1008; *Potoff v. Chubb Indemnity Ins. Co.*, 60 AD3d 477; *Kennel Delites, Inc. v. T.L.S. NYC Real Estate, LLC*, 49 AD3d 302; *Throgs Neck Bagels*, 241 AD2d at 69; *Novick v. United Services Auto. Ass’n*, 225 AD2d 676; *Casey v. General Acc. Ins. Co.*, 178 AD2d 1001. Application of Exclusion 23 under the Policy requires the equivalent analysis.

The question, in this case, is not an issue of fact. Both parties accept and rely upon the essential facts as stated in the Cameron Report and the PalMar Report regarding the conditions, circumstances and events leading up to the loss. Based upon those reports, it can be inferred that both the excessive rainwater and the malfunctioning sewer drain are conditions without which the loss would not have occurred. The question is fundamentally a legal one; namely: whether the non-covered event or condition (excessive water), as compared to the presumably covered event or condition (broken drain), is more proximately connected to the loss, so as to relieve the insurer of its obligation to compensate the insured.

“Proximate cause does not necessarily refer to the cause nearest in point of time to the loss. But the true meaning of the maxim is, that it refers to that cause which is most nearly and essentially connected with the loss as its efficient cause. . . the concept of proximate cause is a limited one . . . (and) the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to metaphysical beginnings.” **Throgs Neck Bagels**, 241 AD2d 66 at 69-70. (Internal citations and quotations omitted)

Compelling authority is found in the case of **Album Realty** [80 NY2d 1008], decided by the Court of Appeals in 1992. Although not articulating a precise definition of “proximate, efficient and dominant,” that case presented a fact pattern analogous to the one at bar. There, a sprinkler head froze and ruptured, causing flooding and water damage to the sub-basement of the insured premises. The applicable policy excluded coverage for damage caused by freezing. The Court of Appeals held that freezing was not the proximate, efficient and dominant cause of the damage for purposes of the exclusionary clause, even though the water damage would not have occurred in the absence of freezing, and the presence of the water could best be explained by the rupturing of the frozen sprinkler head. Noting that the loss was “visibly occasioned by water damage,” the Court of Appeals held that “only this most direct and obvious cause should be looked to.” The Court reasoned that “[a] reasonable business person would conclude in this case that plaintiff’s loss was caused by water and would look no further for alternate causes.” **Album Realty**, 80 NY2d at 1010-1011.

Similarly, the First Department in **Kennel Delites**, [49 AD3d at 303] held that interior water damage following a rainstorm fell within the policy exclusion for property damage caused by rain, notwithstanding the insured’s contention that fallen debris from a neighboring building had clogged its roof drain, allowing the water to accumulate and enter the building. Citing **Album Realty**, The First Department applied the same reasoning, namely that “[a] reasonable business person would conclude in this case that the interior property was damaged by rainwater from the previous evening’s storm, and would look no further for alternate causes.” **Kennel Delites**, 49 AD3d at 303. *See also Casey*, 178 AD2d at 1002 (“while the clogged drain certainly contributed to the loss, the actual cause of the loss was the presence of surface water.”)

As the above cases dictate, this Court must look to the obvious, immediate and physical cause of the destruction of the retaining wall. Considering the events as they occurred here, a reasonable person, employing ordinary parlance and understanding, would not say that the retaining wall was felled by a malfunctioning storm drain. The operative force, which directly effected the damage, was excessive water – flowing water, surface water, water pressure or water mixed with soil. The Court need not trace the damage back to any contributing or ultimate cause, even if the damage would not have occurred “but for” that cause.

How then, can the Court reconcile the cases cited by Plaintiffs, in which water was the direct, immediate and physical cause of the damage but held *not* to be the dominant and proximate cause? In both **Novick** [225 AD2d 676] and **Popkin** [48 AD2d 46], the water damage due to flooding was occasioned by a town or city water main break. In

both cases, the Courts interpreted the applicable policy exclusions (for losses caused by flood, surface water, ground water, or water that backs up through sewers or drains), to apply only to “natural phenomena.” A water main break was not a natural phenomenon, so the losses resulting therefrom were not excluded. The Court in **Popkin** reasoned that the damage “did not occur because water backed up through sewers or drains *independent* of the water main break. It was the water main break itself which caused the damage and as a corollary caused the backup of the sewers. Common sense dictates that these events are inseparable.” 48 AD2d at 49 (emphasis in original). Plaintiffs strain to apply this reasoning to the circumstances at bar, arguing that the overflow of water that destroyed the retaining wall was inseparable from the broken, deteriorating or malfunctioning manhole, and thus the broken, deteriorating or malfunctioning manhole was the proximate cause of the loss.

The Court disagrees. In **Popkin**, the inseparable nature of the contributing causes was secondary to, and served to highlight, the primary rationale that the water flow did not originate from an independent natural source. The crucial factor for the Appellate Division in both **Popkin** and **Novick** was that the presence of water, in the first instance, was not the result of a “natural phenomenon” such as rainfall, a tidal wave or the like. In fact, the Court in **Novick** held that to the extent that subsequent water damage was attributable to rainfall, the policy exclusion might apply. 225 AD2d at 677. Both cases are distinguishable from the case at bar, in which the source of the water was, indisputably, the heavy rainfall. No reasonable person would contemplate that the water appeared or commenced flowing because a manhole had deteriorated.

In the **Potoff** case [60 AD3d 477], however, the natural vs. artificial dichotomy did not exist. There, plaintiff’s property was damaged by rainwater which leaked into her apartment from the roof. The policy at issue was a named-peril policy which covered (i) accidental discharge or overflow from within a plumbing system and (ii) water which backs up from within drains. The **Potoff** plaintiff asserted that the cause of the damage was a clogged roof drain that had overflowed. The **Potoff** defendants argued that the damage was caused not by water emanating from within the drain, but by rainwater on the roof that had seeped into the house. The Court agreed with the plaintiff (noting that the water cleared from the roof immediately after the drain obstruction was removed), and held that the damage caused by the water from the clogged drain was within the coverage of the policy.

The facts in **Potoff** are analogous to those of the case at bar. In the case at bar, the Pal Mar Report established that the damage was caused primarily by the overflow from the clogged drain, as opposed to the natural runoff from the hillside. Nonetheless, the cases are distinguishable. The policy at issue in **Potoff** specifically covered losses due to

overflow from clogged drains whereas the Policy at issue here specifically excludes them. Moreover, the policy in **Potoff**, as best as can be discerned from the decision, did not contain an exclusion for losses caused, at least in part, by weather conditions (together with another excluded cause). Thus, in **Potoff**, the Court had only to determine whether the damage was caused by the overflow from a plumbing system or a drain back-up to find coverage. The issue was to determine the dominant or efficient cause, as between the overflow from the clogged drain or the seepage from the roof (the operative cause of the damage being rainwater in either event). The issue was not, as it is here, to determine the dominant cause as between the clogged or broken drain (an ultimate cause or cause in fact) and the rainwater itself (the immediate or operative cause). Accordingly, **Potoff** has limited, if any, application to the case at bar. The **Kennel Delites**, [49 AD3d at 303] case, discussed above, addressed the precise issue presented here. There, the Court held that the rainwater itself, the immediate operative force effecting the damage, was the proximate cause of the loss, and it was unnecessary to look any further, to the clogged drain or to any other event in the chain of causation.

The Court concludes that based upon the foregoing, in particular the Cameron Report, the Pal Mar Report, and the controlling authority found in **Album Realty** [80 NY2d 1008] and progeny, the proximate, efficient and dominant cause of the damage to Plaintiffs' retaining wall was the overflow of rainwater from a clogged sewer drain, which falls within at least one of the several exclusions cited in Defendant's disclaimer of September 24, 2007 (*See, e.g.*, Exclusions 2, 4, 17, 21, 23).

The Court has considered the Plaintiffs' remaining arguments and found them to be either wholly without merit or insufficient to affect the outcome of this determination. Accordingly, it is

ORDERED, that the motion by Defendant ALLSTATE INSURANCE COMPANY (Seq. 003) for summary judgment pursuant to CPLR §3212 dismissing the First Cause of Action only is **granted** (the Third Cause of Action survives); and it is further

ORDERED, that the cross-motion by Plaintiffs HARRY WILNER and JUDITH WILNER (Seq. 004) for summary judgment pursuant to CPLR §3212 on the First Cause of Action is **denied**.

This constitutes the decision and Order of the Court.

Dated:

*March 13, 2011*

**ENTERED**

MAR 28 2011

*Donald J. S. C.*

J.S.C.

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**NASSAU COUNTY**  
 COUNTY CLERK'S OFFICE