SHORT FORM ORDER

INDEX No. 10-36871
CAL No. 12-02005CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 3-5-13
ADJ. DATE 5-14-13
Mot. Seq. # 001 - MD

DONALD A. LEONE and IVONNE L. REVERON,

Plaintiffs,

- against -

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant.

JOHN E. LANDER, ESQ.
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Babylon, New York 11702

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Upon the following papers numbered 1 to 42 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 27 - 33 ; Replying Affidavits and supporting papers 34 - 38 ; Other memoranda of law, 39 - 40, 41 - 42 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant State Farm Fire and Casualty Company for summary judgment dismissing plaintiffs' complaint in this breach of contract action is denied.

This breach of contract action involves a casualty loss arising from water damage at the premises owned by plaintiffs located at 34 Alpine Way, Huntington Station, New York on January 15, 2010. On November 29, 2009, plaintiffs purchased a homeowners insurance policy from defendant State Farm Fire and Casualty Company. After the January 2010 loss, plaintiffs filed a claim with State Farm for the loss sustained in the amount of $175,000. The complaint alleges that State Farm breached its contract with plaintiffs by denying the claim and that State Farm was unjustly enriched by the premiums paid to it by plaintiffs.

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State Farm now moves for summary judgment dismissing plaintiffs' complaint against it on the ground that the policy it issued expressly excludes coverage for claims involving water damage arising from frozen pipes under circumstances where the property is vacant and the insureds fail to use reasonable care to maintain heat. State Farm further argues that plaintiffs did not "reside" at the subject property on January 15, 2010, and thus, the insured property does not qualify as their "residence premises" under the policy. In support of the motion, State Farm submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, the homeowner's insurance policy issued to plaintiffs, and affidavits of Kristine Menendez and Paul Angelides. Plaintiffs oppose the motion arguing that triable issues of fact exist as to whether the subject property was their "residence" pursuant to the insurance policy, and whether they maintained reasonable heat at the property. In opposition, plaintiffs submit inter alia an affidavit of Donald Leone and a transcript of his examination before trial.

The homeowner's insurance policy at issue states, in relevant part, as follows:

> COVERAGE A - DWELLING
>
> 1. Dwelling. We cover the dwelling used principally as a private residence on the residence premises shown in the Declarations.
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> ***
>
> SECTION 1- LOSSES INSURED
>
> We insure for accidental direct physical loss to the property described in Coverage A, except as provided in Section 1- Losses Not Insured.
>
> SECTION 1- LOSSES NOT INSURED
>
> 1. We do not insure for any loss to the property described in Coverage A which consists of, or is directly and immediately caused by, one or more of the perils listed in items a through n below, regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
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> ***
>
> b. freezing of plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance or by discharge, leakage or overflow from within the system or appliance caused by freezing. This exclusion applies only while the dwelling is vacant, unoccupied or being constructed. This exclusion does not apply if you have used reasonable care to:

(1) Maintain heat in the building; or

(2) Shut off the water supply and drain the system and appliances of water.

At his examination before trial, plaintiff Donald Leone testified that at the time of the incident, he was living at a house located on 1790 Front Street in East Meadow, New York. He stated that he and his wife purchased the subject property in 2006, and that they intended to renovate it and make it their primary residence. He explained that the renovation project was long, as they were doing work room-by-room. He stated that he and his wife would stay overnight at the subject property several times during the renovations, and that there were contractors there all the time. He testified that they had started the process of moving furniture into the subject property and that they stayed there as much as time permitted. He further testified that the temperature in the house was kept at 65 degrees to 68 degrees and that the heat was always on.

Kristine Menendez states in her affidavit that she was the claims representative from State Farm assigned to the subject matter and that she conducted an inspection of the subject property on January 19, 2010 with another State Farm employee and Donald Leone. She states that Mr. Leone explained to her that water damage occurred on January 15, 2010 due to a pipe freezing in the upstairs master bathroom. She states that she observed extensive water damage throughout the property. She also states that there were no beds in any of the bedrooms, that all the closets were empty, and that there were only a few items of furniture such as two sofas wrapped in plastic and a table with chairs in the kitchen. Based on her observations and the expert report of Angelides, she determined that the house was unoccupied at the time of the loss.

Paul Angelides, a licensed engineer, states that he was retained by State Farm to investigate and determine the cause of property damage to the subject property. He states that during an inspection of the subject property, he found the broken shower valve and determined that there was no manufacturing or installation defects on it. He states that the fracturing of the plastic shower valve cap is consistent with freeze damage as a result of a failure to maintain adequate heat within the building during a period of sub-freezing weather. Mr. Angelides states that based on the weather data from Farmingdale, New York collected by the National Oceanographic and Atmospheric Administration, the outdoor temperatures were below freezing consistently during the period prior to and including the day of the loss. He states that based on a calculation to determine if adequate heat was maintained within the building, and the amount of fuel plaintiff had delivered to the property, there is a "compelling case" that adequate heat was not maintained in the building. He further states that a review of the electric utility bills also reveals very low electric consumption, which is consistent with a building that is unoccupied. He concludes that the broken shower valve and the resulting interior water damage occurred because the valve froze and burst due to inadequate heat within the building.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The

court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Generally, it is the insured's burden to establish coverage and the insurer's burden to prove the applicability of an exclusion (*see* ***Consolidated Edison Co. of N.Y. v Allstate Ins. Co.***, 98 NY2d 208, 746 NYS2d 622 [2002]; ***Rhodes v Liberty Mutual Ins. Co.***, 67 AD3d 881, 892 NYS2d 403 [2d Dept 2009]; ***Barkan v New York Schools Ins. Reciprocal***, 65 AD3d 1061, 886 NYS2d 414 [2d Dept 2009]). In order to establish an exclusion, the insurer must demonstrate that the exclusion relied upon is "stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (***Continental Cas. Co. v Rapid-American Corp***., 80 NY2d 640, 652, 593 NYS2d 966 [1993]; *see* ***Seabord Sur. Co. v Gillette Co.***, 64 NY2d 304, 486 NYS2d 873 [1984]; ***Guishard v General Security Ins. Co.***, 32 AD3d 528, 820 NYS2d 645 [2d Dept 2006]). To be enforceable, any exclusions from coverage must be clear and specific and any ambiguities will be construed most strongly against the insurer (***see Matter of New York Cent. Mut. Fire Ins. Co. v Ward***, 38 AD3d 898, 833 NYS2d 182 [2d Dept 2007]; ***Guachichulca v Laszlo N. Tauber & Assoc. LLC***, 37 AD3d 760, 831 NYS2d 234 [2d Dept 2007]).

Furthermore, the standard for determining residency for purposes of insurance coverage "requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain" (***New York Cent. Mut. Fire Ins. Co. v Kowalski***, 195 AD2d 940, 941, 600 N.Y.S.2d 977 [3d Dept 1993]; *see* ***Government Empls. Ins. Co. v Paolicelli***, 303 AD2d 633, 756 NYS2d 653 [2d Dept 2003]). The issue of residency is a question of fact to be determined at a hearing (*see* ***Matter of State Farm Mut. Auto. Ins. Co. v Bonifacio***, 69 AD3d 864, 892 NYS2d 555 [2d Dept 2010]; ***State Farm Mut. Auto. Ins. Co. v Nicoletti***, 11 AD3d 702, 784 NYS2d 128 [2d Dept 2004]; ***Hollander v Nationwide Mut. Ins. Co.***, 60 A.D2d 380, 401 NYS2d 336 [4th Dept 1978]).

Here, plaintiffs both testified during their examinations before trial that they would go to the subject property very often, that they stayed there overnight several times, and that they were in the process of moving into the property. Thus, an issue of fact exists as to whether plaintiffs' presence in the house, coupled with their intent to eventually move into the subject property, is sufficient to satisfy the insurance policy's requirements (*see* ***Dean v Tower Ins. Co. of N.Y.***, 19 NY3d 704, 955 NYS2d 817 [2012]; *cf.* ***Vela v Tower Ins. Co. of N.Y.***, 83 AD3d 1050, 921 NYS2d 325 [2d Dept 2011]). While State Farm contends that its claims representative observed very little furniture in the subject property, courts have held that a householder need not necessarily have conventional or, indeed, any furniture in a house to occupy it, as his or her presence for sleeping, eating and working purposes can literally constitute occupancy (*see* ***Dean v Tower Ins. Co. of N.Y.***, *supra*; ***Page v Nationwide Mut. Fire Ins. Co.***, 15 AD2d 306, 223 NYS2d 573 [3d Dept 1962]; *see also* ***Perrotta v Middlesex Mut. Ins. Co.***, 37 AD2d 783, 783, 325 NYS2d 251 [2d Dept 1971]). State Farm also asserts that the exclusion applies as the subject property was "being constructed" at the time of the loss. However, the term "being constructed" is not defined in the insurance policy. While it is undisputed that the subject property was under renovation at the time of the loss, the language used in the contract renders it susceptible to more than one reasonable interpretation (*see* ***Brad H. v City of New York***, 17 NY3d 180, 928 NYS2d 221 [2011]; ***Evans v Famous Music Corp.***, 1 NY3d 452, 775 NYS2d 757

[2004]). It is unclear whether the undefined term "being constructed" in the contract encompasses any and all types of renovation work done to the property, as well as construction of the property. When the language of a contract is ambiguous, its construction presents a question of fact that may not be resolved by the court on a motion for summary judgment (*see* ***County of Orange v Carrier Corp.***, 57 AD3d 601, 869 NYS2d 211 [2nd Dept 2008]; ***Yerushalmi & Assoc., LLP v Westland Overseas Corp.***, 21 AD3d 1098, 803 NYS2d 620 [2d Dept 2005]; ***DePasquale v Daniel Realty Assoc.,*** 304 AD2d 613, 757 NYS2d 477 [2d Dept 2003]). Finally, a question of fact exists as to whether plaintiffs used reasonable care to maintain heat in the subject property, as both plaintiffs testified that the heat was always on in the house, and Mr. Leone specifically testified that the temperature of the house remained at 65 degrees to 68 degrees at all times. Accordingly, State Farm's motion for summary judgment dismissing the complaint against it is denied.

The foregoing constitutes the Order of this Court.

Dated: September 4, 2013
Riverhead, NY

HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION